Nos. 96 and 99.

Supreme Court of the United States.

Brf. of Paige for Dooley et al.

OCTOBER TERM, 1900.

Numbers 96 and 99.

Filed Nov. 9, 1900.

No. 96.

MICHAEL F. DOOLEY, INDIVIDUALLY AND AS RECEIVER OF THE FIRST NATIONAL BANK OF WILLIMANTIC, CONNECTICUT, AND JOHN A. PANGBURN, APPELLANTS,

vs.

HAROLD F. HADDEN AND JAMES E. S. HADDEN.

FILED JULY 14, 1899.

No. 99.

HAROLD F. HADDEN AND JAMES E. S. HADDEN, APPELLANTS,

vs.

MICHAEL F. DOOLEY, INDIVIDUALLY AND AS RECEIVER OF THE FIRST NATIONAL BANK OF WILLIMANTIC, CONNECTICUT, AND JOHN A. PANGBURN.

Brief for Messrs. Dooley and Pangburn.

INDEX.

ABSTRACT OR STATEMENT OF THE CASE.

FIRST HEAD: The character of the action.

The action is in equity and was brought by the Haddens, creditors of the Natchaug Silk Company, a Connecticut manufacturing company, against Mr. Dooley, who was receiver of the First National Bank of Willimantic, Connecticut, and Mr. Pangburn, who had brought, in the Supreme Court of New York, an action upon certain notes of the Natchaug Company, which had been assigned to him by Mr. Dooley, and in that action had first attached, and then, after having got a judgment for money on the notes, had taken under execution, certain silk which had been, or was, the Natchaug Company's.

The amended bill, filed after the proofs were all in, and

after there had been *seven* hearings upon the merits, alleged:

1. That one Risley was cashier of the Bank and its "chief executive officer," and also a director in the Natchaug Company, "and its sole financial "manager and acted as such in all its dealings "with the bank," and that one Fowler was a director, both of the bank and the Natchaug Company.—(R. 12).

2. That the Natchaug Company had been insolvent ever since before December, 1893, and that owing to the indebtedness of the Natchaug Company to the bank, the failure of the latter involved failure of the bank, "and, therefore, the life of the bank "was dependent upon the continuance of the busi- "ness of the Silk Company; all of which was well "known to Risley and the bank."—(R. 12–13).

3. That in order to secure credit to the Natchaug Company, Risley made up false statements of its assets and liabilities, upon the faith of which the complainants—the Haddens—sold upon credit to the Natchaug Company, raw silk to the value of something over twenty thousand dollars.—(R. 13).

4. That Risley died and "the failure of both the "Silk Company and the Bank became imminent," and that with intent to defraud, &c., one Chaffee, the president of the Natchaug Company, shipped to New York the silk in question, and then "with- "out any authority of the Board of Directors of "said Natchaug Silk Company, and without any "right or authority so to do, and with full knowl- "edge of the insolvency of said Company as afore- "said," and with intent, &c., made bills of sale of the silk to the bank.—(R. 14–15).

5. That with intent, &c., Dooley, without any consideration, transferred to Pangburn, notes of the Natchaug Company to the amount of sixty-seven thousand dollars, "and caused said Pangburn to "commence suit thereon against said Company by "the said attorney of said Dooley," in which suit Pangburn got an attachment which was levied on the silk, and in time got judgment by default, under which judgment execution was levied on the silk and the sheriff was about to sell it.—(R. 16–17).

6. That said notes against "the Natchaug Silk Com- "pany, so sued upon by said Dooley and said "Pangburn, *were invalid and without founda- "tion or legal right against said company, and "that they were without consideration, and wholly "illegal and void, and did not, at that time, rep- "resent any valid indebtedness of the Silk Com- "pany, and the Silk Company had a complete de- "fense to said suit and claim of said Pang- "burn.*"—(**R.** 17).

7. That the complainants—the Haddens—had also got an attachment.—(R. 17).

To this Mr. Dooley answered:

1. That the Natchaug Company owed his bank more than two hundred and fifty thousand dollars, and that the silk had been transferred to his bank, as part payment of their indebtedness, and that, therefore, he owned it.

2. That the notes which he had transferred to Mr. Pangburn were good notes, and that they were transferred by order of the Circuit Court of the United States.—(R. 350–352).

And Mr. Pangburn answered:

That the notes were good notes, and that his attachment, judgment and execution were good.—(R. 356-358).

SECOND HEAD: The Proofs, and the decrees below.

The proofs as we claim them to be are:

1. The Natchaug Company owed the bank *three hundred and ninety-three thousand dollars* ($393,624.12). It owed all its other creditors *forty thousand dollars*—included in which was the complainants' twenty-two thousand dollars—a debt contracted for raw silk which the complainants had sold to it on six months' credit, in the face of a statement which showed that the Natchaug Company owed two hundred and fifty thousand dollars and had a profit and loss account of but forty-three thousand dollars (R. 258).

2. There was a by-law of the Natchaug Company which was this: "The Board of Directors shall annually "elect a general manager, *who shall have* ENTIRE "*charge of the business and affairs of said Com-* "*pany*, subject to the order and approval of the "Board of Directors."

   Italics and capitals mine.

   Chaffee was general manager, president, and a majority of the stock. He turned out ten thousand dollars worth of silk to the First National Bank of Norwich—thus paying a debt to it of that amount—and four thousand dollars worth of silk to Morimura, Arai & Co., thus paying

a debt to them of that amount. He turned our goods to the Hall and Bill Printing Company—value not given—to pay a debt to it (R. pp. 53–54, 381). He then shipped the silk in question to New York and there made a bill of sale of it to the bank and the bank took possession of it. He then went back to Willimantic and called his directors together. Three of them, beside himself, attended. He told them what he had done and asked them to ratify his actions. Two of the directors declined, not to ratify, *but to act at all as directors*, upon the ground that it would be bad policy since a receiver had been appointed, as it had, just before, that is—*after* Chaffee had turned over the silk—and neither of those two has at all acted as a director since. *Of course there was no meeting*, since Chaffee and the remaining director could not hold a meeting alone. To the fifth director, who was out of the State, Chaffee wrote telling what he had done.

No one of the directors, then, nor at any other time before or since, made the slightest objection to what Chaffee had done or expressed the slightest disapproval of it.

3. Mr. Dooley, becoming receiver of the bank, moved all but forty-five cases of the silk to Brooklyn, leaving the forty-five cases in New York. He then sold sixty-seven thousand dollars of the debt of the Natchaug Company to Mr. Pangburn—the statute law of New York being so that Mr. Dooley, because he was a non-resident, could not sue the Natchaug Company, while Mr. Pangburn, who was a resident, could—Mr. Pangburn sued, and got an attachment, and put it in the hands of the sheriff of Kings County, in which Brooklyn is. The complainants

sued, got an attachment, and delivered it to the sheriff of New York County. Matters being in this state, Mr. Dooley, after the complainants' attachment was out, but before the sheriff of New York had levied under it upon the forty-five cases, moved them to Brooklyn, where the sheriff of Kings levied upon the whole under Mr. Pangburn's attachment. Three days afterwards the complainants delivered their attachments to the sheriff of Kings.

Upon these proofs the Circuit Court dismissed the bill upon the merits.

Upon appeal by the complainants the Circuit Court of Appeals held:

1. That Chaffee's transfer of the silk was beyond his power, *because not anthorized by the board of directors.*

2. That the removal of the forty-five cases of silk to Brooklyn after the complainants' attachment was out, was a thing so UNFAIR as in equity to *postpone the lien* of the Pangburn attachment to that of the complainants'.

This latter holding was a discovery of the court's own. In *nine* arguments on the merits it had not occurred to anyone of the three counsel for the complainants. *The facts in regard to it were not pleaded, although the amended bill was filed after the proofs had closed, in order, it is to be assumed, that the complainants might conform their pleading to what they supposed they had proved, nor were the proofs as to this matter taken with the matter itself in the mind of either counsel, as will appear.*

The Circuit Court of Appeals, therefore, reversed the part of the decree which related to the forty-five cases of silk.

From the reversed part of the decree Mr. Dooley and Mr. Pangburn appeal.

From the affirmance part of the decree the complainants appeal.

THIRD HEAD: History of the Case.

This action was brought in the Supreme Court of New York. It was to enjoin the defendants Dooley and Pangburn from doing anything with or to certain silk which was or some time had been the property of The Natchaug Silk Company, and a temporary injunction was made by Mr. Justice Stover of that court, in accordance with the prayer of the complaint.

The action having been removed into the Circuit Court of the United States, the defendants Dooley and Pangburn moved to dissolve the injunction. The motion was heard by Judge Lacombe and was denied (R. p. 719). A second motion and a third motion, were also denied (R. p. 719). They then appealed to the Court of Appeals where the order was affirmed, and that Court delivered an opinion which will be found, at *post*, Appendix, p. 1.

This was in the May of 1896.

The taking of the testimony in the case closed in the July of that year, and the defendants Dooley and Pangburn then made another motion, upon the plenary proofs, to dissolve the injunction. This motion was also heard by Judge Lacombe. Both the counsel for the complainants were heard at length and supplementary briefs were sent in by both sides.

The motion was granted on the twenty-seventh of

November, and Judge Lacombe's opinion is printed in this brief (*post*, Appendix, pp. 5–7).

The complainants then moved for a rehearing, and upon that motion both of their counsel were heard at length, and that motion was denied, and Judge Lacombe delivered another opinion which is also, with the order dissolving the injunction, printed here (*post*, Appendix, pp 6, 30).

The order is quite necessary as will presently appear.

Upon the fourteenth of January, 1897, the complainants filed their amended bill (R. 11–22) the proofs having been closed since July. Upon the second day of April of that year, 1897, Judge Lacombe made an order opening the proofs so far as to permit the complainants to examine the books of the First National Bank of Willimantic. Under this order the proofs were taken which occupy pages 339 and 348, also pages 565 and 667, both inclusive, of the Record, and which are confined entirely to the amount of the debt of the Natchaug Company to the bank.

The case came to final hearing before Judge Coxe, in November, 1897, and resulted in a decree dismissing the bill on the merits (Decree R. p. 691, and opinions R. pp. 682 and 690).

Upon appeal by the complainants the Circuit Court of Appeals reversed the decree so far as forty-five (45) cases of the silk were concerned. This was January, 1899 (see the decree, R. pp. 721–2, and the opinions (R. pp. 708–718), and on a petition or a rehearing, affirmed this (R. p. 720).

From this decree Messrs. Dooley and Pangburn appeal, and the complainants also appeal.

FOURTH HEAD: The Debt of the Natchaug Company.

On the proofs before Judge Lacombe, the debt appeared by the evidence of Barrows, the bookkeeper of the Natchaug Company and complainants' witness, to have been

1 January, 1894.....$312,195.26
1 January, 1895..... 330,695.26
26 April, 1895..... 319,916.85
(R. 77–78)

And by the evidence of Hayden, the receiver, also complainants' witness, it appeared that the debt of April, 1895, was $333,826.25.

This was made up as follows:

He testified that there were outstanding notes of the Natchaug Silk Company which he recognized as valid obligations of the company and of his trust to the amount of $329,253.13 (R. pp. 103–4, R. p. 475, 360,). In addition to this his report shows (R. p. 447) two other notes of $5,000 each and the overdraft, $34,231.59, already referred above, as testified to by Barrows. Of these notes there were in the possession of the bank when it closed and are still in the possession of Mr. Dooley 52 of these notes amounting to $232,000 (R. p. 361, and see the notes in evidence, R. pp. 561–577), besides the Pangburn notes, $67,594.66, and the overdraft, $34,231.59; making a total on Mr. Hayden's testimony of $333,826.25.

It now appears from the books of the bank as follows:

1 January, 1894, excess of notes discounted over notes paid. Testimony of complainants' expert (R. 345–6)..... $220,969.90

Of this $70,922.63 was live paper (R. 571). The

balance of $150,047.72 was all *dead* paper, overdue mostly since 1891.

1 January, 1895, same.....$235,469.90
20 April, 1895, same.....$210,392.53
(R. p. 345–6).

Next comes the item of what I suppose ought to be called notes *bought*, which arose in this way: It was the practice of the bank to guarantee the notes of the Natchang Company and sell them mostly through Stedman, Steere and Wheeler of Boston. It would receive the proceeds and place a corresponding amount to the credit of the Natchaug Company in the latter's deposit account. So far, of course, the bank loses nothing, provided the Natchaug Company pays the note. When the note came due the bank would send its own cheque to pay it—receive the note—and *usually* charge up the amount against the Natchaug Company and deliver the note. This practice had been going on for years.

Sometimes, however, the bank would *omit* to charge the amount against the Natchaug Company and would *not* deliver the note. Such a transaction would, of course, amount in law to a *purchase* of the note and the bank would become its *owner*.

Transactions of this kind amount to $25,000.
(R. pp. 625–633, 666).

Note	3 Jan., '93,	@ 4 mos.	(R. fols. 1955, 1945)....	$5,000
"	" "	" " "	(" " ")....	5,000
"	27 Aug., '92,	" 4 "	(" 1968, 1962)....	5,000
"	27 Aug., '92,	" 4 "	(" " ")....	5,000
"	23 Sep., '93,	" 4 "	(" 2056, 2059, p. 516)	5,000
				$25,000

Then there are notes sold as above, guaranteed by the First National Bank, which did not come due until after

the 20th April, 1895, and for which the bank is, of course, liable on the guaranty.

These amount to $55,000.

Note	26 Nov.,	'94, @	6	mos.	(R. fol. 1822)....	$5,000
"	7 Jan.,	'95, "	6	"	(fol. 1837)....	5,000
"	3 Jan.,	'95, "	6	"	(fol. 1842)....	5,000
"	26 Feb.,	'95, "	4	"	(fol. 1859)....	5,000
"	18 Feb.,	'95, "	5	"	(fol. 1870)....	5,000
"	25 Feb.,	'95, "	5	"	(fol. 1888)....	5,000
"	21 Feb.,	'95, "	5	"	(fol. 1895)....	5,000
"	27 Mar.,	'95, "	4	"	(fol. 1905)....	5,000
"	27 Mar.,	'95, "	4	"	(fol. 1907)...	5,000
"	27 Oct.,	'94, "	6	"	(fol. 1927)....	5,000
"	25 Oct.,	'94, "	6	"	(fol. 1933)....	5,000
						$55,000

There are thirty-one notes of stockholders of the Natchaug Company—guaranteed by that company—given

All but four, Exhibits 32, 32½, 33, 61, aggregating $555

between 14 October, 1888, and 3 June, 1890, and upon these the Natchaug Company paid interest down to July, 1894.

(R. pp. 647–657, Exhibits 32 and 61 inclusive of 17 April, 1897.)

These aggregate $36,000.

Exhibit 32	$50
32½	150
33	125
34	250
35	250
36	625
37	625
38	1,875

Exhibit 39	1,125
40	250
41	250
42	125
43	75
44	21,250
45	500
46	1,000
47	250
48	250
49	125
50	500
51	600
52	750
53	250
54	125
55	750
56	125
57	750
58	1,250
59	1,000
60	500
61	250
	$36,000

Then there is a note of Fenton (Exhibit 31, R. fol. 2007) endorsed by the Natchaug Company, $3,750.

And a note of O. S. Chaffee, No. 15 of the Pangburn notes, endorsed by the Natchaug Company (Exhibit O of 15 July, R. p. 532), $2,250.

This note was discounted *for the Natchaug Company* as early as 14 December, 1889 p. 566, and has been regularly kept renewed by it down to Exhibit O (R. pp. 566–573).

Let us add these up:

Notes discounted and not paid	$210,392.53
Notes bought	25,000.00
Notes guaranteed	55,000.00
Stockholders' notes	36,000.00
Fenton	3,750.00
O. S. Chaffee	2,250.00
	$332,292.53

Add now interest for *three* years on one hundred and fifty thousand dollars of overdue paper,

The bulk of this paper came due in 1891, and the date at which we are ascertaining the debt is 20 April, 1895.

which is	27,000.00
And then there is a total of	$359,392.53

If the overdraft of $34,231.59 be added the grand total of the debt will be $393,624.12.

The complainants objected to the admission of the proofs which show this (R. pp. 667–681).

Let us suppose those objections to be well taken, and these proofs to go out.

What of it?

The case will then stand upon the proofs as they were before Judge Lacombe. The complainants have offered proof that the indebtedness consisting of discounted notes amounted to $210,392.53, but *they have not put in any proof that there is no other kind of indebtedness*. There is not any evidence, therefore,

to the contrary of that which was before Judge Lacombe.

And of course the two hundred thousand dollars of indebtedness, which rests on their own testimony, is sufficient for our purposes.

As has been already stated, the total debt of the Natchaug Company outside of its debt to the bank was but fifty-six thousand dollars; and this was reduced to forty thousand dollors by silk turned out by Chaffee to others—the bank's debt therefore being about *nine-tenths* of the whole.

And in this is the complainant's debt of twenty-two thousand dollars, which, as already stated, was for raw silk, sold on six months' credit, without any security, in the face of a statement which showed an indebtedness of *more than two hundred and sixty thousand dollars* ($262,407.10) and a profit and loss account of only *forty-two thousand dollars* ($42,635.35). (R., p. 258.)

FIFTH HEAD: The proofs as to the transfer of the silk.

The complainants upon this issue examined four witnesses:

Fenton, the secretary and treasurer and one of the directors of the Silk Company;

Wilson, a director;

Barrows, the bookkeeper, and

Hayden, the Receiver.

The defendants examined one witness:

Chaffee, the president and general manager and a director.

The testimony of these witnesses, with the records of

the Natchaug Company and the bills of sale, constitute the proofs on this issue.

And from these it appears the Natchaug Silk Company was organized in 1887 and received a special charter from the Legislature of Connecticut in 1889.

During the whole period of its existence with the exception of one year—1890—1, Mr. Chaffee was president (R. 33, 446), and during the *whole* period of its existence he was general manager (R., pp. 63–64).

The by-law of the company, adopted 3d February, 1891, defining the powers of the general manager, is as follows:

"The Board of Directors shall annually elect a general "manager, who shall have entire charge of the business "and affairs of said company, subject to the order and "approval of the Board of Directors" (R., pp. 63, 445.)

In point of fact Mr. Chaffee was supreme in the management of the company, in all the branches of its business, and in particular he disposed of all the silk manufactured by the company from its beginning. Nobody interfered with his management in any particular. Nobody ever questioned his orders in regard to anything. The directors never acted either by way of "order" or "approval" in any single instance. What they did was:

1. To elect officers.

2. To declare dividends.

3. To pass a resolution about a strike after hearing a committee of the strikers.

4. To purchase the Conantville property.

   It will presently appear that by the law of Connecticut while the powers of a general manager include transfers of, and all transactions about personal property, they do not extend to dealings with real estate.

5. Mortgage on the Conantville property.

That the board of directors acted only in this way is shown by the minutes (R., pp. 423–432, 441–456) as well as Fenton's testimony, next to be quoted.

The above appears as follows:

Fenton—He was director, treasurer, secretary and superintendent of the mill.

After testifying that he kept the records as secretary and signed the papers, checks and notes as treasurer, he says (R., p. 44):

"Q. Your business was limited to looking after the "mill and manufacturing the goods? A. Yes.

"Q. Who looked out for the outside management of "the company? A. Mr. Chaffee.

"Q. What superintendence, if any, did the other "directors exercise in regard to outside matters? A. Not "any.

"Q. The matter all left to Mr. Chaffee? A. Practically "it was.

"Q. They allowed him to go on and manage the com-"pany? A. They did.

"Q. Did they interfere with his management of it at "all? A. I don't think so.

"Q. Do you know of any place where they interfered? "A. I do not.

"Q. Not from the time of its organization down to now? "A. No, sir.

"Q. Your management of the mill, was that under his "management also? A. Yes.

"Q. You obeyed all orders he gave you from the time "of the organization of the company until the Receiver "was appointed? A. I did.

"Q. Of course you manufactured a large amount of silk? "A. Yes.

"Q. And that was from time to time sent away, wasn't "it? A. It was sent away as it was ordered.

"Q. Sent away as it was ordered by Mr. Chaffee? A. "No; orders came from salesmen on the road.

"Q. They were all under the direction of Mr. Chaffee? "A. Yes.

"Q. All that silk was disposed of by Mr. Chaffee or his "orders? A. Yes.

"Q. All of it? A. Yes.

"Q. Was he in the habit of consulting with the directors "about business management of the corporation? A. "There were times when he referred to them.

"Q. Name some of those matters? A. Well, in "regard to buying property, dye-house, the bill of "property for dye-house, the Conantville property and "the strike.

"Q. In regard to the strike, is that all? A. No, there "were other things.

"Q. Is that all you remember? A. The matter of "dividends was referred to the Board of Directors.

"Q. Anything else? A. Nothing I recall to mind now.

"Q. All the matters which he did consult them about, "and as to which they acted, are put down in the record "of the company, are they not? A. They are.

"You cannot call to mind any other particular instance "of his referring to the directors? A. That is all I have in "mind now.

"Q. The meetings of the directors are also all recorded "in the book of minutes, are they not? A. Whenever "we had any of the Company business done. Occasion- "ally the directors got together, but transacted no real "business.

Q. Whenever there was any business transaction, you "made record of the meeting? A. Yes.

"Q. Mr. Chaffee, I suppose, would report to them the "general situation of affairs and they would talk matters "over? A. Yes.

"Q. That was all? A. Usually.

"Q. Well, always? A. Unless something special came "up.

"Q. Except those you have mentioned? A. There may "be others.

"Q. Do you recall any others? A. I do not.

"Q. If there are others they will be on the minutes? "A. Yes.

"Q. He was allowed to manage the company's business "as he saw fit and never interfered with, except as you "stated? A. I never remember of his being interfered "with.

"Q. He was never interfered with at all as to the dis- "position of goods? A. I don't remember that he was.

"Q. Mr. Risley was also cashier of the First National "Bank of Willimantic? A. Yes.

"Q. It was there your account was kept? A. So far "as I know.

"Q. All accounts you made on that bank? A. Yes.

"Q. All money was deposited with that bank? A. Yes.

"Q. And all discounts were made at that bank? A. "Yes.

"Q. You knew where the money was coming from "from time to time to carry on the business of the com- "pany? A. From the bank where the checks went and "deposits made.

"Q. The First National Bank of Willimantic? A. "Yes.

"Q. You knew that your paper was being given to the "bank? A. Yes.

"Q. Was there any mention made to the Board of Direc-

"tors as to those financial matters? A. Not that I know "of.

"Q. Then financial matters were left entirely to Mr. "Risley under Mr. Chaffee's directions? A. Yes, sir.

"Q. And neither one or the other was interfered with "by any of the other directors? A. I don't think so.

"Q. You have already said that Mr. Chaffee disposed "of all the silk; his disposition was never questioned or "interfered with by the other directors? A. That was "his part of the business to dispose of the goods.

"Q. His part of the business to dispose of the silk? "A. Certainly."

(R., p. 54) "Q. Did any of the directors, other than "Mr. Chaffee and yourself, make any investigation into "the financial condition of the company at all? Of "course, I include in that question Mr. Risley, Mr. "Chaffee and yourself? A. Not to my knowledge.

"Q. Or to the disposition of the goods by Mr. Chaffee? "A. No, sir.

"Q. As to whether he turned them out for debts or "whether he sold them for cash? A. I don't think there was any.

"Q. Did they ever make any investigation as to how "much property the company had or where it was sit- "uated? A. Not to my knowledge.

"Q. Is it true that their functions as directors were "merely nominal, so far as management was concerned? "A. You might put it in that way, I suppose.

"Q. They took no part in borrowing money or giving "credits or anything of that kind? A. No.

"Q. All done by Mr. Chaffee? A. All of it."

(R., p. 64) "Q. In the discharge of your duties as "secretary and treasurer, you always followed Mr. "Chaffee's instructions, as well as in the discharge of "your duties in the mill? A. Yes."

He also testified that goods were turned out in payment to Morimura, Arai & Co. (R., p. 52); to the Hall & Bill Printing Company (R., p. 53), and on the 12th April (R., p. 380) to the second National Bank of Norwich, the latter being to the amount of $10,000 (R., pp. 55–56); and that neither he nor any of the other directors objected to any of it, nor dissented from it in any way, nor took any steps to set any of them aside (R., pp. 53, 55, 57, 381–383), and none of the goods were ever returned (R., pp. 383–381).

Wilson.

Wilson said he was "nominally" a director (R., 65, 68).

As to Mr. Chaffee's authority, he gave this testimony, (R., pp. 68–69):

"Q. You say you were known nominally as a director "of the Natchaug Silk Company? A. That is what I "said.

"Q. That means, I suppose, that you took no part in "the management of the company? A. No active part; 'no, sir.

"Q. You left it all to Mr. Chaffee? A. I attended some "of the meetings of the directors.

"Q. Did you do anything at the meetings you at-"tended? A. Yes; generally smoked pretty good cigars.

"Q. Otherwise? A. Had a pretty good time.

"Q. Otherwise? A. Incidentally, discussed business.

"Q. Did you interfere with Mr. Chaffee's business? "No, sir.

"Q. Left everything to him? A. Always.

"Q. Never questioned him what he done with the "manufactured silk? A. Not at all.

"Q. Whether he sold it or turned it out for debt? A. "No, sir.

"Q. There was not the slightest question as to his

"power on your part or the other directors? A. No, sir.

"Q. He could do anything he liked? A. Yes."

Both Fenton and Wilson were the complainants' witnesses, and it cannot be successfully contended that either of them is at all friendly to Chaffee or to the First National Bank.

Mr. Chaffee and his family owned a majority of the stock in 1891 (R., p. 443). The proofs do not show how the stock has been owned since, but we have a presumption as to the continuance of fact.

The above are the proofs of Mr. Chaffee's authority, generally. We come now to the proofs as to the special transactions between the bank and the company.

Barrows, the bookkeeper of the Silk Company, was called as a witness by the complainants, and he testified that the indebtedness of the Silk Company to the bank was as follows (R., 77):

1893, December 1st	$312,195 26
1894, January 1st	312,195 26

It thus appears from the proofs that the indebtedness of the Silk Company to the bank was:

In January, 1894	$312,195 26
On the 15th of April, 1895, and to and including the 23d of April, 1895	393,624 12

On the first day of January, 1890, Barrows, the bookkeeper, executed to the bank a bill of sale of silk to the amount in value of $26,610.24 (R., p. 527). Mr. Chaffee swears that this bill of sale was executed and delivered by his direction and authority, and that it was done by virtue of an agreement made by him with the bank because of a demand made by Risley for security for the money which the bank had advanced to the Silk Company. He says that by virtue of an agreement made then between himself and Risley the goods described in the bill of sale were put up in cases; the cases numbered as they

are in the bill of sale, nailed up and the letter "R" put on each case. "They were then supposed to be under his (Risley's) control." That the Silk Company had the privilege of taking those goods and replacing with other goods at such times as it might have orders for them; and that all this was done (R., pp. 367–368). Fenton denies this, or rather he says he knew nothing about it. But there is no doubt about the bill of sale and no doubt the goods were kept in the cases.

On the thirteenth and fifteenth of January, 1894, the indebtedness of the Silk Company to the bank being then, as already shown, $312,195.26, two other bills of sale of goods, one of $39,866.89 and the other of $26,403.15, were made to the bank. They were executed on the part of the Silk Company by both Chaffee and Fenton (R., pp. 48, 508–509). Mr. Chaffee says that they were executed and delivered because of a demand made by Risley for more security, and under an agreement made at the time by him that the goods were to be put into a vault and a room built at the time "to put them into." That Risley was to have the combination of the lock to the vault and a key to the special room which was built at the end of the packing room, "at the time and for that purpose"; that the goods described in the first bill of sale were among those put into the special room and that the goods described in the other bill of sale were those put into the vault; that all this was done and the vault and room kept locked, and that among the goods so disposed of were those described in the bill of sale of 1 January, 1890, and such as had replaced them (R., pp. 368–370), the agreement being similar to the one of 1890, in so far as that they might use the goods if they replaced them with others (R., pp. 384–5). The room and the vault were then full and were kept full to the end (R., pp. 385). Fenton tries to deny this, but he cannot deny his own signature,

and he admits that the giving to Risley of the key of the room and the combination of the vault were talked about at the time the room was built and the bills of sale given (R., 131–2); that Risley came over to the mill "at the time those invoices" (bills of sale, Exhibits A and B, R., pp. 128, 132); he calls them "invoices," (R., p. 132) "were given and looked at the safe and the room" (R., p. 128), and he thinks that he gave him the combination (R., p. 127).

Here is the text of a part of his testimony as to this matter:

"Q. You had a room partitioned off, did you not, to "put silk in? A. Yes, sir.

"Q. And that room was partitioned off about the time "this bill of sale was made? A. About that time.

"Q. Wasn't it partitioned off at that time and for that "occasion? A. It was partitioned off for stock room.

"Q. Wasn't it at that and for that occasion? A. I "can't say it was expressly for that occasion.

"Q. But it was very near that time? A. Yes, sir.

"Q. You think Mr. Risley had a key to it? A. I don't "think he did.

"Q. Do you know whether he did or not? A. I don't "know that he didn't. There were two or three keys, I "am not sure which, that hung to the door all the time.

"Q. There was something said about his having a key "to the room? A. Yes, sir.

"Q. And you said if he had a key you could not have "access to the room for goods to fill orders? A. Certainly; "if he locked it and took away the keys we could not fill "orders."

"Q. It was a subject of conversation? A. Yes, sir.

"Q. He had the combination of the lock? A. I am "not sure.

"Q. It was a subject-matter of conversation? A. He "might have had it.

"Q. So he might have had the key so far as you know "and the combination of the lock. The key and combi- "nation was subject-matter of conversation at the time "the bills of sale were given? A. Yes, sir.

"Q. I speak of January, 1894? A. Yes.

"Q. The bills of sale you are now referring to are Exhib- "its A and B, and the papers which you spoke of as in- "voices in connection at the same time on your direct "examination, are also Exhibits A and B? A. Yes: that "is correct" (R., pp. 131–132).

From this time until the goods were shipped to New York in April, 1896, the special room and the vault were always kept full.

Wilson says that he knew on the 26th of April, 1896, that those goods were formally pledged to the bank (R., p. 69).

Risley died on the 12th of April, 1896 (R., p. 55). After Risley's death and before the seventeenth of April, Mr. Chaffee was sent for to the bank. There were present two of the directors of the bank, the cashier, Mr. Fowler, one of the directors of the Silk Company, and Mr. Chaffee—and either then or at a subsequent meeting of the same persons, Mr. Dooley, then bank examiner, was also present (R., 370–5). They stated to Chaffee that the Silk Company must make the security perfectly good and it was decided to ship the goods to New York to D. E. Adams for account of the bank. They insisted that arrangements must be made at once about securing the goods so that they would be positively secured to them. "They insisted upon my putting these goods into a place "where they were better secured than in the mill" (R., p. 370). Mr. Henry, one of the directors of the bank, and Mr. Dooley, stated that he must fix up the indebtedness

to the bank at once. "They gave me to understand that "we must secure them at once or they would close us "up" (R., 373). Mr. Henry wanted to know if the goods could not be shipped to some commission house in New York where they could have full charge of them. Mr. Chaffee said he didn't know of any commission house to ship to, but he thought they could be shipped to D. E. Adams at 77 Greene Street, New York, and be equally well for them as a commission house, and this was agreed upon between the directors of the bank and Mr. Chaffee, and Mr. Fowler for the Silk Company. Mr. Dooley "asked me about the situation of the property over there. "I told him it was in the vault and the room. He wanted "it put somewhere where he could consider it better se- "cured than there, and it was shipped to New York" (R., p. 376). The goods from the vault and the room were to be inventoried and billed to the First National Bank of Willimantic (R., pp. 370–5), and then Mr. Chaffee told Mr. Fenton about having made this agreement (R., p. 374).

Mr. Fenton does not deny this. Of course, Chaffee, Fowler and Fenton made a majority of the directors, there being but two others, Wilson and Sumner.

The goods from the vault and the room were so inventoried (See inventories Exhibits F2 and G2 of April 3), and shipped on the 17th, 18th and 19th, by Fenton, in pursuance of Chaffee's orders (R.. pp. 370, 375, 377). Chaffee says they were shipped for account of the First National Bank (R., pp. 373–4). Fenton denies that he shipped them for account of the First National Bank and produces the railroad receipts which were merely to D. E. Adams, 77 Greene Street, New York (R., pp. 117–8, but Thompson, Adams' manager, says he received a letter of advice telling him to get the goods insured for the account of the First National Bank, and that he did so insure them (R., p. 182).

On the twenty-second of April, 1896, Mr. Chaffee, with

Mr. Lucas, counsel for the bank, started for New York. He says that before he started, on that same day, he told Fenton and Fowler that he was going to New York to transfer the goods to the bank, and that they both assented to it (R., p. 378). That he tried to find Wilson, but did not succeed (R., p. 377); and to Sumner, who was out of town, he wrote, telling him what he was going to do (R., p. 378).

Fenton denies this. He says Chaffee did not tell him any such thing—but he says Chaffee told him what he had done as soon as he, Chaffee, got back, and that he, Fenton, did not object to it (R., pp. 38, 53). Neither Fowler nor Sumner was called as a witness, though both are living in Willimantic. Fowler and Sumner, with Chaffee, make a majority of the Board of Directors.

On the twenty-third of April, in New York, Chaffee made and delivered to Mr. Lucas for the bank the bills of sale which are given at pages 211 and 242 of the Record and Adams signed and delivered to Mr. Lucas, for the bank, the acknowledgment that he held the silk for the bank (R., 370–9, 564).

On the twenty-ninth Mr. Chaffee called a meeting of the directors

Chaffee returned on the twenty-seventh, which was a Saturday, in the afternoon (R., p. 38), and he called the directors together on the following Monday.

and asked them to ratify his act in making the bills of sale. Fenton (R., pp. 57, 418), and Wilson (pp. 436–8) refused to do so, upon the ground, and only upon the ground, that since a receiver had been appointed—the order appointing Hayden receiver had been made two days before in a proceeding begun that day, the twenty-sixth, "it would be safer" that they should not act as directors any more, and that it "would not be good policy" for them to act as directors any more (R., pp.

57, 418). Of course, Chaffee and Fowler could not hold a meeting alone. They held no meeting, and have not held any meeting, nor acted as directors since (R., pp. 57, 415). Neither has any one of them resigned. Not one of them has ever objected to any of the bills of sale or any of the agreements with the bank; and not one of them has ever indicated any disapproval (R., p. 378), or started or advised any order, act or proceeding to set them aside. Neither has Hayden, the receiver; and he was informed of them on the twenty-sixth also (R., p. 378). The testimony establishing the above was taken ten months afterwards.

> The silk in Chicago, St. Louis and Baltimore was also transferred to the First National Bank, but this action is concerned only with the goods sent to New York.
>
> The reason why it was agreed to send the goods to New York was because they thought that if the goods were turned over to the bank in Wilimantic, and kept elsewhere than in the mill, it would create too much excitement and talk, as the silk company then expected to pull through (R., p. 410).

Fenton's testimony as to what accurred when Chaffee called the directors together on the Monday is as follows (R., p. 57):

"He asked Mr. Wilson and Mr. Fowler to come into "the office.

"Q. Who? A. Mr. Chaffee. Mr. Dooley and Mr. Lucas "came in with him, or shortly after. He stated there "what he had done during his absence, and asked that "we ratify his action in transferring the goods.

"Q. What then? A. I told him I did not consider we "had any right to act in the matter; that Receiver had been appointed and it was safer not to act.

"Q. Did anybody else give any other reason? A. I "don't think so.

"Q. Did any of the directors indicate any objection to "the thing having been done? A. I have no recollection "that they did.

"Q Or indicate any direction, as Director, to set it "aside? A. I have no recollection that they did.

"Q. You simply concluded not to act any further as "directors because a Receiver had been appointed?. A. "Yes.

"Q. And there was no meeting at all? A. I did "not consider it a meeting. There was no vote called for and no business done."

(R. p. 53.) "Q. After Mr. Chaffee returned from Chi- "cago, I suppose he told you that he had transferred all "the goods in those offices to the First National Bank? "A. He did.

"Q. All in New York, Baltimore and Chicago? A. "Yes.

"Q. Did you object to it at all when he told you? A. "I don't think so.

"Any of the other directors? A. I don't think so.

Mr. Chaffee:

(R. 418.) "I wish to correct the statement that I made "about the meeting at the office on April 29th, 1895. I "want to add that the reason given by Mr. Wilson for "not ratifying my action, was that they did not think it "good policy to act at all as directors.

"Q. That is the whole of the reason given? A. Yes."

(R. p. 381.) "Q. Have any of the directors questioned "these transfers? A. Not to my knowledge.

"Q. Or taken any step or proceeding to set them aside? A. No, sir.

"Q. Or has Mr. Hayden, the Receiver, done so? A. "Not to my knowledge.

"Q. Well, you are somewhat intimately connected with "the business of the Natchaug Silk Co. and would have "been pretty apt to know of it? A. Yes, sir.

(R. p. 383). "Q. Was Mr. Hayden informed of these "transfers? A. Yes, sir.

"Q. How, when and by whom? A. I informed him on "my return from the west."

Mr. Hayden testified to the same thing (R. p. 85).

SIXTH HEAD.

Mr. Pangburn's Action:

On the first of June, 1895, John A. Pangburn, a resident of New York, brought a suit in the Supreme Court of New York, upon sixty-seven thousand dollars of notes the Natchaug Company, which he claimed had been assigned to him by Mr. Dooley, and obtained an attachment under which the Sheriff of Kings County took the silk. In due course he had a judgment, under which he sold the silk upon execution. (R. pp. 541–563).

It is under this that the Circuit Court of Appeals has sustained the decree as to 62 of the total of 107 cases of the silk and reversed it as to the remaining 45 cases.

As to this action the Circuit Court of Appeals said upon the appeal from the injunction (*post*, Appendix, p. 2):

"On May 30, 1895, he (Dooley), sold and assigned "to Pangburn, who is a resident of the State of New "York, notes of the Silk Company, not paid by this trans- "fer, amounting to about $67,000 for the nominal consid- "eration of $200, which sale Dooley made by virtue of "an order of the Circuit Court of the Southern District of "New York, with the approval of the Comptroller of the "Currency, for the purpose of enabling a suit to be

"brought in the State of New York, by a resident of that "State, in his own name, against the Silk Company, a "foreign corporation."

The complainants attacked both the assignment of the notes and the validity of the debt assigned

SEVENTH HEAD: Proofs as to the assignment of the notes by Mr. Dooley to Mr. Pangburn.

There is Mr. Dooley's petition to the Circuit Court for leave to sell to John A. Pangburn of Schenectady, N. Y., notes of the Natchaug Silk Company to the aggregate amount of $67,595.26 for $200, and the order of the Circuit Court, based upon that petition and the approval of the Comptroller of the Currency, authorizing the sale. This was the thirty-first of May, 1895. An assignment of the notes made under seal and duly acknowledged on the first of June, 1895, with two witnesses, acknowledging the receipt of the consideration of two hundred dollars. An affidavit of Mr. Dooley that in pursuance of the order of the Court made on the 31st of May, 1895, he had on the first of June sold for the sum of two hundred dollars and caused to be delivered to John A. Pangburn of Schenectady, New York, the notes described in the order, and that he had executed and delivered to him the instrument of assignment and transfer, a copy of which is annexed, and he had received from Mr. Pangburn on that day the sum of two hundred dollars as the purchase price of the notes, and the order of the Circuit Court confirming the sale and transfer and delivery of the notes, based upon the above-mentioned papers and reciting all of the above facts (R. pp. 295–302).

The complainants then proceeded to take the testimony of Mr. Pangburn, and this is the way they did it: They found a small judgment against him under which they got an order for his examination on supplementary proceedings. They selected a time when both Mr. Paige and Mr. Strong had gone South beyond the reach of a telegram, and Mr. Pangburn had no counsel, and then brought him under that order before a referee and with three lawyers at him, and he without counsel, they kept the proceedings going through five hearings (March 9, 11, 14, 17 and 21 of 1896), in all there being a space of thirteen days between the beginning of the proceedings and the last day, when they did not end it, but adjourned to a day to be fixed on two days' notice (R. pp. 329–333). During all this time they were trying to induce him to sell his judgment to them (R. pp. 219, 233, 236).

In this attempt they failed. He would not sell. They could neither tempt him nor frighten him into selling. They then filed his deposition; borrowed it from the Clerk's office and kept it until they called him as a witness on the twenty-first of May, when they produced it before him and put it in evidence (R. p. 238).

They then called the three lawyers to swear to his declarations.

The testimony thus elicited is as follows:

To begin with, he swore that "there was no agreement "that I should sign the notes or judgment back to him or "any one else" (R. 332). This was on his examination on supplementary proceedings, and the three lawyers could not get him to say anything else.

He said that Mr. Paige asked him if he would buy the notes, and he said yes, and later in the day Mr. Paige gave him the notes and the assignment, and that he then brought a suit and handed the notes and the assignment to Mr. Paige.

That he paid no *money* for them.

The following is the language as to what is deemed important;

"I have had notes assigned to me, but don't know when "it was; they were assigned to me through E. Winslow "Paige; I had a written assignment of them and the notes "in my hands; I had them only a few minutes; then I "handed them back to Mr. E. Winslow Paige; I got them "from him; that was at his residence on Washington "Avenue in this city; while I had them in my hands I "signed some papers and commenced a suit; I simply "handed them back to him, but, so far as I remember, "did not sign any written assignment" (R. p. 331).

"Mr. Paige told when he handed me the notes that he "wanted me to hold them so that he could commence a "suit in my name; the notes were made by the Natchaug "Silk Co., and amounted to about $67,000" (R. p. 331).

"When he handed me the notes he said I would probably get something out of it" (R. p. 331).

"The whole matter he wanted to use my name with the "understanding that if there was anything in it I was to "get something out of it, but there was no agreement "as to what I was to get; I don't know what I was "to get; I knew about the notes before they were "handed to me; the same day; but not before the same "day; he spoke to me before he showed them to me; *he "said he had some notes, and he wanted to start a suit "by some one in the State, and asked if I would buy the "notes; I said yes;* no price was mentioned; that was "all; he did not then or at any time say how much I was "to get out of them; the first conversation was at his "house; both were; later he had the notes and handed "them to me, and I signed the paper; I went to some "notary's office with him and swore to the complaint; I "paid no money for the notes; I have had no conversation

"with him in regard to the matter except once; that was "four or five weeks after; that was here in the city; I "think he said that he had a judgment; I have not talked "with him since, and do not know what has been done "about it; *there was no agreement that I should sign "the notes or judgment back to him or any one else*" (R. p. 332).

"So far as I know, any judgment recovered still stands "in my name; I don't know what my interest in that "judgment is worth; I think, and have thought, that "there was nothing in it for me. I don't know whether "there was enough in it to pay this judgment" (R. 333).

"I merely considered the matter an accommodation to "Mr. Paige, to use my name. If there was anything in it "for him, I assumed that he would give me something, "but how much I never made up my mind. I don't ex- "pect anything, I don't consider that I have a right to "anything" (R. p. 333).

As a witness in this case, he said, on his cross-examination:

> His direct examination consisted as, to this matter, of simply identifying and putting in the above examination (R. p. 214).

"Q. Mr. Pangburn, at the time Mr. Paige gave you the "notes and assignment, what conversation occurred be- "tween you and him?

"A. Our conversation was that he had some notes there "and that I might make some money.

"Q. Did you authorize Mr. Paige to pay for them the "sum of $200 out of the moneys which he was then "owing you?

"A. Yes, sir. I authorized Mr. Paige to pay the $200 "on these notes out of the money which he owed me.

"Q. What else did you say to Mr. Paige?

"A. I told him to go ahead and sue the notes.

"Q. And then what did you say?

"A. I gave him the notes and he brought the suit.

"Q. Did you understand at that time that you were be-
"coming the absolute owner of the notes in law?

"A. Yes, sir.

"Q. And that you could sell them if you pleased, and
"give a good title?

"A. Yes, sir.

"Q. And you could retain, if you pleased, for your-
"self, all the proceeds which you recovered in that suit,
"in law?

"A. Yes, sir.

"Q. Did you make any agreement other than that
"above stated in regard to them at all?

"A. No, sir.

"Q. No promise of any kind or agreement to give any
"part of the proceeds to anybody?

"A. No, Sir.

"Q. And you understood, of course, as you have
"already stated, that you had the same right to sell them
"and give a good title?

"A. Yes, sir.

"Q. Has anybody since tried to buy them from you?

"A. Yes, sir."

And he then proceeds to tell about the attempt to make him sell (R., pp. 218–219).

"Q. Have you now given all the conversation which oc-
"curred between yourself and Mr. Paige, at the time you
"bought the notes?

"A. I think I have."

(R., p. 220.)

On his re-direct examination he said:

"Q. Do you remember just when it was that you had
"your first conversation with Mr. Paige about these
"notes? Won't you just repeat to me now all that was

"said between you then—just what he said and just what
" you said?

" A. I went up to Mr. Paige's house and he told me
" he had some notes there, and that I could buy them
" and make some money out of them, and he handed me
" the notes. I looked them over and said to Paige: 'I
" 'will buy these notes and give you so much for them,
" 'and if you think we can get the money out of it, go
" 'on and sue them, for I want some money.'

" Q. Now, have you repeated all that you said?

" A. I think that is all I said on that matter.

(R., p. 222.)

" Q. You say in this affidavit (examination in supple-
" mentary proceedings) as follows: " 'The whole matter
" 'was, he wanted to use my name and I let him, with
" 'the understanding if there was anything in it I was to
" 'get something out of it, but there was no agreement as
" to 'what I was to get.' Is that true?

" A. The whole of it is not true.

" Q. What is not true about it?

" A. Just read that again, please.

" Q. 'The whole matter was, he wanted to use my
" 'name and I let him, with the understanding if there
" 'was anything in it I was to get something out of it, but
" 'there was no agreement as to what I was to get.' Is
" that true?

" A. No, sir; that is not true?

" Well, what is untrue?

" A. He was not to use my name. He was not to use
" me as a tool.

" Is the rest of the statement true:

" Yes, sir."

(R., p. 223.)

" Q. You state near the end of your deposition as fol-
" lows: 'I merely considered the matter as an accom-

" ' modation to Mr. Paige to use my name. If there
" ' was anything in it for me, I assumed he would give
" ' me something, but how much I never made up my
" ' mind. I did not expect anything. I do not consider
" ' I have a right to anything.' What part of that state-
" ment do you now say is untrue?

" A. Well, I expected to get the whole of it. What-
" ever there was in it.

" Q. You did?

" A. Yes, sir.

" Q. Well, with that correction, do you say that the
" statement which I have just read to you is true?

" A. I think it is."

(R. p. 224).

Two of the lawyers employed then swore to Mr. Pangburn's declarations while they were trying to make him sell. They swore that he said, " that he didn't know that " he had any interest in the judgment," and that " he " said he didn't understand the matter," and " sub- " sequently stated that he didn't wish to do anything for " fear of putting Mr. Paige in an uncomfortable posi- " tion."

(R., pp. 233, 235).

Mr. Pangburn had previously on his re-direct examination given his version of this conversation in this way:

" Q. Well, did you tell him that you would not take
" it because it would interfere with Mr. Paige's plan?

" A. No, sir.

" Q. Did you not say that you would not take anything
" because it would put Mr. Paige into a hole? What did
" you say on this subject?

" A. I said no, I would not want to.

" Q. Well, what reason did you give?

" A. Well, I said that Mr. Paige and I had always been

" good friends and I wanted his opinion as counsel before " I did anything."

(R. p. 221).

They afterwards called Mr. Dooley. Mr. Dooley testified that he had never seen Mr. Pangburn and never had had any communication with him of any kind. That directly after the first of June he received a letter from Mr. Paige stating that he, Mr. Paige, had on the first of June received $200 from Mr. Pangburn, and directing Mr. Dooley to charge that sum to Mr. Paige's account. The letter also enclosed Mr. Paige's account. The counsel for the complainants called for that account. It was produced. They inspected it, and did not put it in evidence, nor did they ask any more questions on that subject. It may be that that account showed that Mr. Paige had, previously to the first of June, expended more than two hundred dollars, actual money, for Mr. Dooley. At all events they did not put it in evidence and they dropped the subject.

(R., pp. 147–148).

Mr. Dooley also gave the following testimony:

" Q. Do you mean to say that you were willing to sell " to him debts, valid obligations, to the amount of " $67,500, for $200?

" A. I did."

(R. p. 143).

" Q. Mr. Dooley, in transferring, in making that assign- " ment to Mr. Pangburn, was it your intention to transfer " sixty-seven thousand and that number of hundreds of " dollars of the actual debt of the Natchaug Silk Company?

" A. It was.

" Q. When you afterwards discovered in your posses- " sion notes which it might be claimed were renewals of " some or any of those notes, did you send or give them " to Mr. Paige with directions to deliver to Mr. Pang- " burn?

"A. I did.

(See R., p. 152 for correction making answer read as above.)

"By Mr. Putney:

"Q. Do you now know when you did that?

"A. No; I could not tell you.

"Q. Did you send them to him by mail?

"A. I think I brought them down to him."

(R. p. 149.)

The claim made by Mr. Dooley against the receiver of the Natchaug Silk Company was put in evidence—and the pertinent part of it is as follows;

"THE NATCHAUG SILK COMPANY TO THE FIRST NATIONAL
"BANK OF WILLIMANTIC,

"1895.		*Dr.*
"April 26.—For money had and received by		
"the said Natchaug Silk Company		
"to and for the use of the said		
"First National Bank of Williman-		
"tic, and for money lent by the said		
"First National Bank to the said		
"Natchaug Silk Company.....		$327,926.27
"Less—The claim of $67,594.96 assigned by		
"Michael F. Dooley, Receiver of		
"the said First National Bank of		
"Willimantic, Conn., to John A.		
"Pangburn of Schenectady, N. Y.		$67,594.66
"Balance.....		$260,331.61

"Interest on the same."

R. p. 534.)

On the twenty-eighth of March, 1896, Mr. Pangburn by an instrument under seal assigned the notes and his judgment to Abram R. Serven of Waterloo, N. Y.

(R. p. 539.)

This was after the attempt of the complainants' counsel to make him sell to them.

And we now claim that Mr. Serven is the owner of the notes and judgment.

The above is the substance of the proofs on this subject.

EIGHTH HEAD: Proofs on the issue as to whether the notes are valid debts.

As early as 1891, Risley began letting the discounted notes of the Natchaug Company go unpaid. That is to say, when a note which had been discounted, came due, he would *not* charge it to the account of the Natchaug Company.

The Natchaug Company would, however, send over a renewal note, which Risley would discount and put the proceeds to the credit of the Natchaug Company, which would proceed to cheque them out.

In this way, by the middle of the year 1892, there had accumulated in the bank, about one hundred and thirty thousand dollars of *dead paper*, and ninety thousand dollars of *live* paper.

The Natchaug Company would, however, continue to send over renewals of the *dead* as well as the *live* paper, and Risley would keep them all. *Sometimes he would charge up a note which had not been discounted.* And the only way the Natchaug Company knew how much money it had to its credit was by Risley's balancing its pass-book, in the doing of which he would credit the proceeds of certain notes, describing them, and would charge certain notes, *which he would return.* These balances, thus made, were copied into the journal, and on the stub of the cheque book of the Natchaug Company. But on the

bill book there were simply noted renewals of all the notes which had been issued, and such renewals were actually made and sent over to the bank and Risley kept them.

The result was the accumulation of an enormous amount of paper in the bank. And when the notes were assigned to Mr. Pangburn, it was impossible to tell which of something like two millions of dollars of notes, which Mr. Dooley found in the bank, represented the actual debt of about three hundred thousand dollars of note indebtedness, and which did not.

The facts, as to the Pangburn notes, as they have since developed, present four questions:

1. *The very simple one of a note discounted, overdue and unpaid.*

2. *A note discounted, years before, remaining unpaid in the bank, a long series of renewals sent over to the bank and* NOT DISCOUNTED, *but kept by the bank, and Mr. Dooley assigns the* LAST *renewal.*

3. *A note discounted, or bought, years before—remaining unpaid in the bank—a long series of renewals sent over to the bank and not discounted, but kept by the bank, and Mr. Dooley assigns not the* LAST *renewal, but the third before the last.*

4. *The same state of facts as number 3—except that the last renewal, not assigned, did not come due until after Mr. Pangburn brought his action, but did come due, before he got his judgment.*

5. *A series of notes regularly discounted and charged, but Mr. Dooley assigns not the* LAST *one,* BUT THE SECOND

BEFORE THE LAST. *None of them having, according to Risley's usual habit been returned as paid, although actually charged.*

Of course, when these facts developed, all of the notes of the different series were delivered by Mr. Dooley to Mr. Pangburn and were by the latter deposited in court.

As to Number 1 of the above propositions, that is, notes about which there is no question, the amount is $24,172.63.

As to Number 3, that is, where renewal notes had been sent and kept by the bank, but not unused, it includes the rest, except note number *one* of the following list for $5,000.

As to number 4, where the last of these unused renewal notes came due *after* Mr. Pangburn got his attachment, but *before* he got his judgment, they amount to $20,922.63, being notes 9, 10, 11, and 12 of the following list.

As to number 5, where the renewal notes had been discounted and charged—there is but one instance—note number one of the following list, for $5,000.

The notes are as follows:

1.	January 9, 1894, at 4 months.....	$5,000 00
2.	January 9, 1894, at 4 months.....	5,000 00
3.	January 12, 1894, at 4 months.....	5,000 00
4.	January 12, 1894, at 4 months.....	5,000 00
5.	January 16, 1894, at 4 months.....	5,000 00
6.	January 16, 1894, at 4 months.....	5,000 00
7.	January 18, 1894, at 4 months.....	2,500 00
8.	January 19, 1894, at 4 months.....	5,000 00

9. January 26, 1894, at 4 months..... 5,000 00
10. January 26, 1894, at 4 months 5,000 00
11. January 29, 1894, at 4 months..... 5,000 00
12. January 29, 1894, at 4 months..... 5,922 63
13. December 15, 1894, at 4 months 1,000 00
14. January 12, 1895, at 3 months..... 5,922 63
15. January 26, 1895, O. S. Chaffee, endorsed by Silk Company, and protested, at 4 months, 2,250 02

(Schedule; R., p. 146. Bill book under those dates, R., pp. 467, 472–3.)

Of these the following may be laid out of account at once:

Numbers 3 and 4 of January 12, 1894, each $5,000.....	$10,000 00
Number 5 of January 16, 1894.....	5,000 00
Number 13 of December 15, 1894.....	1,000 00
Number 14 of January 12, 1895.....	5,922 63
Number 15 of January 26, 1895.....	2,250 00
	$24,172 63

The bill book (R., pp. 467–474) shows that numbers 3, 4, 5, 13 and 14 were not paid; and as to the Chaffee note, number 15, the proof shows that the note was discounted and the proceeds placed to the credit of the Natchaug Company on the sixth of February, 1895; so that the judgment is good for $24,172.63 and interest in any aspect of the case. Of the remaining nine notes—numbers 1, 2, 6, 7, 8, 9, 10, 11 and 12 of the above list—the bill book under the appropriate dates shows that they were all outstanding obligations, but that they had been renewed,

that is, it shows that renewal notes had been issued for all of them. However, the stub of the cheque book, the journal and the bank pass book (R., pp. 479–507) show conclusively as to all of the notes except number one that they had *not* been renewed.

It appears by the stub of the cheque book (R., p. 490) that number one (one of the notes of January 9th, 1894) was charged, and by the same at page 489 that the proceeds of a renewal note of May 12th, were credited; that when that note came due it was charged (p. 489) and the proceeds of a renewal note of August 11th credited (p. 491, and see see bill book under date of May 12th, 1894, and August 11th, 1894, pp. 469, 470); that the note of August 11th, 1994, was charged (p. 492) and the proceeds of a new note of January 10th, 1895 (p. 493 and bill book under date of January 10th, 1895, p. 473), credited. All of these notes have been deposited in court.

That the other eight notes were neither charged nor the renewals credited appears from the following, viz.:

Between the 26th of February, 1894, and the 12th of May, 1895, when the account closed, discounted notes were credited four times' and the book was balanced at the same time.

These times were the

25th June, 1894.
5th November, 1894.
13th February, 1895.
14th May, 1895.

On the 25th June, 1894, the pass book shows a credit of what on the stub of the cheque book are called 30 notes (I can count but 29) discounted, the dates, amounts and the time of each being given (pp. 496–499).

These are also set out on the journal (pp. 479–480). Besides this list of the notes the journal entries are simply

DEBIT.

$118,853.07 1st Nat. Bank.
3,069.56 Int.
134,422.63 Bills Pay. 30 N. S. C. Notes.
(R., p. 479.)

CREDIT.

Bills payable.....$121,922.63.
(Here follows the list of the notes discounted.)
1st Nat. Bank.....$134,422.63.
(R., p. 480.)

The stub of the cheque book gives as of that date: 30 N. S. notes retnd. June 26, 1894,

(Here follows: a list of 31 notes described by dates, amounts and due dates)

footing same as journal entry, $134,422.63 (R., p. 488), and as discounted the same list of notes as the lists given in the pass book and journal of the same date as above, 29 notes, footing $121,922.63 (R., p. 489).

The fifth of November, 1894.

The pass book gives 36 notes discounted, dates, time and amounts as before (R., pp. 501–2).

The journal gives the same 36 notes discounted—and the entries otherwise are:

DEBIT.

$151,388.55 1st Nat. Bank.
3,956.71 Interest.
$140,345.26 Bills payable 33 notes.
(R., p. 483.)

CREDIT.

Bills payable.....$155,345.26
(Here follows the list of the notes discounted.)
First Nat. Bank.....$140,345.26
(R., p. 484.)

The stub of the cheque book gives the same 36 notes discounted, footing same as journal entry, $155,345.26.

(R., p. 491,)

and 33 notes charged—describing them—footing same as journal entry, $140,345.26.

(R., p. 490.)

Thirteenth of February, 1895 :

The pass book gives 33 notes discounted dates, time and amounts as before.

(R., pp. 504–5.)

The journal this time gives no list. Its entire entries are as follows:

DEBIT.

$123,500.	Bills payable 30 notes.
128,524.18	1st Nat. Bank
3.398.45	Int.

(R., p. 485.)

CREDIT.

First Nat. Bank.....$123,500

Bills payable..... 131,922.63

(R., p. 537.)

The stub of the cheque book gives the list of the same notes as the pass book, except that there is a note of Jan. 12 instead of Decr. 6, with the footing of the list the same as the journal entry, $131,922.63.

(R., p. 493.)

and list of bills payable Dr.

30 notes (describing them)

footing—same as journal entry—$123,500.

(R., p. 492.)

Fourteenth of May, 1895 :

The pass book gives 12 notes discounted dates, time and amounts as before.

(R., pp. 506–7.)

The journal this time gives no list. Its entire entries are as follows:

DEBIT.

$37,500. Bills payable 9 N. S. C. notes.
51,191.03 1st Nat. Bank.
1,308.97 Int.
(R., p. 485.)

CREDIT.

Fst. Nat. Bank.....$37,500
Bills payable 12 notes..... 52,500
(R., p. 486.)

The stub of the cheque book gives:

Bills payable *Dr.*
9 Notes (N. S. Co.) retd.
May 15, '95.
(Describing them)
footing—same as journal entry—$36,500.
(R., p. 494.)

BILLS PAYABLE, *Cr.*

12 Notes (N. S. Co.)
(Describing them—same as notes in pass-book.)
Footing—same as journal entry—$52,500.
(R., p. 494.)

This is all. Of course it is only necessary to look through these four lists to see if any of the charges and credits on "the due days" have been made.

The following statement may assist.

The twelve notes in question came due as follows:

	DATE 1894.					DUE.	
1	Jan.	9	4	mos.....	$5,000	May	9–12
2	"	9	4	"	5,000	"	9–12
3	"	12	4	"	5,000	"	12–15
4	"	12	4	"	5,000	"	12–15
5	"	16	4	"	5,000	"	16–19
6	"	16	4	"	5,000	"	16–19

	DATE. 1894.					DUE.
7	Jan.	18	4	mos.....	2,500	May 18–21
8	"	19	4	"	5,000	" 19–22
9	"	26	4	"	5,000	" 26–29
10	"	26	4	"	5,000	" 26–29
11	"	29	4	"	5,000	" 29–June 1.
12	"	29	4	"	5,992.63	" 29–June 1.

All the notes charged between 26th February and 25th of June are given on the stub of the cheque book (R., p. 488).

Of the above notes none appear except number 1.

A four months' note for five thousand dollars, dated the sixteenth of January, and due, of course, May 16–19, is charged (R., p. 488), but that this was neither number 5 nor 6 in the above list is shown as follows: The bill book shows that *three* notes of that description were made (R., y. 572). The stub of the cheque book shows that the one which was charged was "returned June 26, 1894" (R., p. 488). This was when the book was balanced. The bank, therefore, would not have it, but it would have numbers 5 and 6, which were not charged and not returned.

For numbers 3 and 4, as above stated, no renewals were ever made.

Numbers 1, 2, 3, 4, 13, 14 and 15 require, therefore, no further consideration.

There remain:

	DATE. 1894.			DUE.
5.	19	May.....	$5,000	19–22 Sept.
6.	19	"	5,000	19–22 Sept.
7.	21	"	2,500	21–24 Sept.
8.	22	"	5,000	22 Sept.
9.	29	"	5,000	29 Sept.–2 Oct.
10.	29	"	5,000	29 Sept.–2 Oct.
11.	1	June.....	5,000	1–4 Oct.
12.	1	June.....	5,922.63	1–4 Oct.

Notes answering the above description were found in the bank, and have been deposited in court (Appendix, p. 37).

That they were neither credited nor charged, appears from the books of the Natchaug Company as follows:

All notes credited or discounted between 26th February, 1894, and 25th June, 1894, appear three times:

1. In the journal (R., p. 480).
2. In the bank pass-book (R., pp. 498, 499).
3. On the stub of the cheque book (R., pp. 488, 489).

No one of the above notes appears in either list.

That the list is complete is, of course, conclusively shown by the pass-book—but it is also shown by the fact that the aggregate of the amounts of the notes in the list is the amount of the journal entry (R., pp. 480, 489).

All notes charged between 26th of June, 1894, and 6th November, 1894, appear on the stub of the cheque book (R., p. 488). Not one of the above notes is there.

	DATE.		DUE.
	1894.		1895.
5.	22 Sept.....	$5,000	22–25 Jan'y.
6.	22 Sept.....	5,000	22–25 Jan'y.
7.	24 Sept.....	2,500	24–26 Jan'y.
			(27 Jan. Sunday.)
8.	25 Sept.....	5,000	25–28 Jan'y.
9.	2 Oct.....	5,000	2–5 Feb.
10.	2 Oct.....	5,000	2–5 Feb.
11.	4 Oct.....	5,000	4–7 Feb.
12.	4 Oct.....	5,922.63	4–7 Feb.

Notes answering the above description were found in the bank, have been deposited in court.

That they were neither credited nor charged appears from the books of the Natchaug Company as follows:

All notes credited or discounted between twenty-fifth June, 1894, and fifth November, 1894, appear three times.

1. In the journal (R., p. 484).
2. In the bank pass book (R., pp. 501–2).
3. On the stub of the cheque book (R., p. 491).

No one of the above notes appears in either list.

That the list is complete is, of course, conclusively shown by the pass book, but it is also shown by the fact that the aggregate of the amounts of the notes in the list is the amount of the journal entry (R., pp. 497, 488).

All notes charged between the fifth of November, 1894, and the fourteenth of February, 1895, are given on the stub of the cheque book (R., p. 493). No one of the above notes is there.

	DATE. 1895.		DUE.
5.	25 January.....	$5,000	May 25–28.
6.	15 January.....	5,000	" 25–28.
7.	26 January.....	2,500	" 26–29.
8.	28 January.....	5,000	" 28–31.
9.	5 February.....	5,000	June 5– 8.
10.	5 February.....	5,000	" 5– 8.
11.	7 February.....	5,000	" 7–10.
12.	7 February.....	5,922.63	" 7–10.

Notes answering the above description were found in the bank and have been deposited in court.

That they were never either credited or charged appears from the following:

All notes credited or discounted after twenty-fifth of November, 1894, appear twice.

1. In the bank pass book (R., pp. 503–505).
2. On the stub of the cheque book (R., p. 493).

No one of the above notes appears in either list.

That the list is complete is of course conclusively shown

by the pass book, but it is also shown by the fact that the aggregate amount of the notes in the list is the amount of the journal entry (R., pp. 493, 486).

That none of these notes were charged appears by this. The account in the bank ends on the thirteenth of April, 1895 (R., p. 507). None of these notes was then as yet due.

The *complainants* put in evidence Mr. Dooley's affidavit, from the motion papers on the injunction motion giving the origin and history of the Pangburn notes (R., pp. 145–6.

The details in regard to each of these fifteen notes are as follows:

DETAILS OF THE PANGBURN NOTES.

NOTE NUMBER ONE, 9 January, 1894, at four months, $5,000.

(*Exhibit M of 15 July, fol. 1693.*)

On the twenty-seventh of August, 1892, two notes of the Natchaug Company of date of twenty-seventh of August, 1892, each at four months and for five thousand dollars, were guaranteed by the First National Bank and sold by it to Stedman, Steere and Wheeler, of Boston (R. fols. 1962–7, pp. 630–2).

The proceeds of these and four other notes of the Natchaug Company, also sold at the same time, being $29,392.35, were received by the bank (fols. 1964–7) and by it placed to the credit of the Natchaug Company in the latter's deposit account (R. fol. 1967).

These two notes came due on the thirtieth of December, 1892 (R. page 460), and were paid to Stedman, Steere and

Wheeler by the bank, by its cheque of 28th December, 1892 (R. fols. 1968–9).

This amount was *not* repaid to the bank by the Natchaug Company (R. fol. 1802).

No notes of $5,000 were paid on the twenty-eighth of December, nor the thirtieth of December, nor anywhere near either of those dates. None were paid between the third of December and the eleventh of January, with the exception of *one* on the fourth of January (R. fol. 1802).

Of course, if there were to be a claim that the note paid the fourth of January is one of these notes, there would be two conclusive answers: 1. We have got a judgment. It is for them to show it to be wrong. There were at that time more than *thirty* ($150,000) of overdue notes of $5,000 each. *It is for them to show that this payment was of one of these two notes and not one of the other thirty.* 2. WE HAVE GOT BOTH THE NOTES. *If one of them had been then paid, it would have been taken up and we would not have it.*

These two notes were found in the possession of the bank by the receiver, and have been deposited with the clerk of the court, in obedience to the order of twenty-sixth January, 1897, dissolving the injunction.

See the order; copy attached to this brief. (Appendix, post, p. 37.)

The bill book shows that on the thirtieth of December, 1892, two notes of five thousand dollars each, and at four months, were made, being said by the bill book to be for account of "Aug. 27" (R. page 513).

That on the third of May, 1893, two notes of five thousand dollars each and at four months were made, being said by the bill book to be for account of "Dec. 30" (R. p. 463).

That on the sixth day of September, 1893, two notes of five thousand dollars each, at four months, were made, being said by the bill book to be for account of "May 3" (R. p. 465).

On the ninth of January, 1894, two notes of five thousand dollars each, at four months, were made, being said by the bill book to be for account of "Sept. 6" (R., p. 467).

THESE ARE NOTES NUMBERS ONE AND TWO OF THE NOTES ON WHICH MR. PANGBURN GOT HIS JUDGMENT (FOLS. 1758–9).

They are also Exhibits M of 15 July and N of 15 July (fols. 1693–4).

All of these notes were found in the possession of the bank by the receiver, and, with the exception of Exhibits M. and N. of 15 July, *have been deposited with the clerk of the court, in obedience to the order of twenty-sixth January, 1897, dissolving the injunction.*

See the order; copy attached to this brief (Appendix, p. 37).

On the twefth of May, 1894, two notes of five thousand dollars each, at four months, were made, being said by the bill book to be for account of "Jan. 9" (R., p. 469).

On the eleventh of August, 1894, two notes of five thousand dollars each, at five months, were made, being said by the bill book to be for account of "May 12" (R., p. 470).

It will, of course, be observed that the dates do not correspond. August eleventh is not September fifteenth.

On the tenth of January, 1895, two notes of five thousand dollars each, at four months, were made, being said by the bill book to be for account of "Aug. 11" (R., p. 473).

Again the dates do not correspond. The August notes would have come due *fourteenth* of January, not *tenth* of January.

All of these notes were found in the possession of the bank by the receiver, and have been deposited with the clerk of the court in obebience to the order of twenty-sixth January, 1897, dissolving the injunction.

In regard to these, and notes presently to be spoken of, as to which similar claims are made, the receiver testified that when he "afterwards"—that is, after the assignment to Mr. Pangburn—"discovered in" his "possession notes which it might be claimed were "the renewals of some or any of those" (Pangburn) "notes," he sent or gave them to Mr. Paige "with directions to deliver to Mr. Pangburn" (R., fols. 45–6, 456).

No one of the notes in these two series was discounted (R., pp. 570, 571, 572, 573.)

NO ONE OF THEM WAS PAID (R. fols. 1802, 1803, 1805, 1806, 1807, 1808).

The exact condition of the series of notes in which is

NUMBER ONE (Exhibit M of 15 July), is as follows:

	NOTE.	TIME.	
1892. August 27. (R., p. 469)	4	$5,000	27 August, 1392, sold to Stedman, Steere and Wheeler (R., fol. 1966) and proceeds put to the credit of the Natchaug Company (R., fol. 1967).
December 28 paid (bought) by bank (R. fol. 1968). Not paid (R.,fol. 182).			

December 30.
new note 4 months
made (R., p. 462).
found in bank.
Not discounted (R., p. 570).
Not paid (R., fol. 1083).

1893. May 3.
new note 4 months,
made (R., p. 463).
found in bank.
Not discounted (R., p. 571).
Not paid (R., fol. 1083).

September 6.
new note 4 months,
made (R., p. 465).
found in bank.
Not discounted (R., p. 571).
Not paid (R. fol. 1085).

1894. (*January 9.* (*Exh. M of 15 July.*)
new note *4 months*,
made (*R., p. 467*).
found in bank.
Not discounted (*R., p. 572*).
This is NOTE NUMBER ONE *Sold to Mr. Pangburn.*

When it came
due it was charged to the deposit account of the Natchaug Company (R., fol. 1567), but *the note was not delivered, but kept.*

May 12.
new note 4 months,
made (R., p. 469). Credited to the Natchaug Company in its deposit account (R., fols. 1565, 1595) of course setting off the charge made by note number one. This note was charged to the account of the

Natchaug Company on the eleventh of August (fols. 1569, 1547), *but the note was not delivered, but kept.*

August 11.

new note 5 months,

made (R., page 521), and credited to the Natchaug Company in its deposit account (R., fols. 1571, 1605) of course setting off the charge made by the note of 12 May—on the tenth January, 1895, was charged to the account of the Natchaug Company (R., fol. 1574), *but the note was not delivered, but kept.*

1895. January 10.

new note 4 months,

made (R., page 524), and credited to the Natchaug Company in its deposit account (R., fols. 1578, 1614), of course setting off the charge made by note of August 11.

Not paid (R., fol. 1808).

ALL except Exhibit M have been deposited with the clerk of the court under order of twenty January, 1897. (See copy attached, Appendix, p. 37).

RESULT :

The Natchaug Company received $4,918.19 10 Sept., 1892 (R., fol. 1967).

It has not paid anything except the interest, the credits of the notes of 12 May, 11 August, and 10 January, exactly, except for the interest, setting off the charges of the notes of 9 January (No. 1), 12 May and 11 August.

All the notes of the series, *except Exhibit M*, are deposited with the court to be cancelled or otherwise disposed of.

Exhibit M represents the DEBT.

NOTE NUMBER TWO.

9 January, 1894, at four months, $5,000.

(*Exhibit N of 15 July, fol. 1694.*)

Everything just said under Note *number one* is here to be repeated

Except this, that note *number two* was NOT *charged* to the deposit account (R., fols. 1567, 1806).

Otherwise the series is exactly like the series of note *number one*, and exactly the same things were done with each note of the series.

NET RESULT:

The Natchaug Company received $4,918.19 September tenth, 1892 (R., fol. 1967).

It is also received $4,880.42 on the twelfth of May 1894 by the credit of the proceeds of the note of that date (R., fol. 1595). Upon this it has paid nothing but the interest, the charges of the notes of 12 May and 11 August being, except for the interest, exactly balanced by the credits of the notes of 11 August and 10 January.

This series of notes therefore represents $10,000, *two* debts of five thousand dollars each.

Exhibit N therefore represents the debt made by the credit of 10 September 1892.

And the three succeeding notes of 12 May, 11 August and 10 January represent another and entirely different debt of the same amount. *One of these three notes*, presumably the last one of 10 January, 1895, *should therefore be left uncancelled.*

NOTE NUMBER THREE.

Date 12 January 1894, four months, $5,000.

(*Exhibit K of 15 July, fol. 1691.*)

On the third of January, 1893, The Natchaug Company

made two notes each for five thousand dollars at four months (R., p. 462) These two notes were sold by Risley to Stedman, Steere and Wheeler (R., fol. 1945), and the proceeds, $9,737.78, were received by the bank and deposited to the credit of the Natchaug Company in its deposit account (R., fols. 1 50–1953). On the fifth of May 1893 the bank sent its cheque for $10,000 to pay these two notes (R., fols. 1955–6), *but did not make any corresponding charge to the Natchaug Company.* It thus became the *owner* of the notes, and it has kept them ever since.

We have now deposited them with the clerk of the court under the order dissolving the injunction. (*Post*, Appendix, p. 37.)

On the sixth of May, 1893, the ninth of Sept. 1893, and the twelfth of Jan. 1894, the Natchaug Company made two notes each for five thousand dollars at four months (R., pp. 463, 465, 467). The note book shows that no renewals were made for the notes of twelfth January and that they have not been paid (R., p. 469).

These are the Pangburn notes Numbers 3 and 4, Exhibits K and L of 15 July.

No one of these notes was either credited or charged (R., pp. 570–2; fols. 1803–5). But all remained in the bank, and, except the last two—the Pangburn notes—have all been deposited with the clerk of the court under the order dissolving the injunction.

Mr. Angelo, the complainant's expert, swears that these notes of the 12 January, 1894, have been paid, and that the statement in the bill book under "Remarks" that they had been paid (R., p. 467) *had been omitted by inadvertence* (R., fol. 1042)

He bases this entirely upon the following: He says the

balance of the Bills Payable account in the ledger is $329,195.74. The amount of notes outstanding shown by the Bill Book, *rejecting these two notes*, is $329,232.13, and the difference is but $26.39 (fols. 1043, 1528–9). *Therefore* THESE two notes are *paid.*

To this there are several conclusive answers:

1. The first is that Mr. Angelo *has made a blunder.* He has taken the WRONG *balance* of the Bills Payable account.

That account is printed at pages 661–663. The last balance *there carried out* is $329,195.74 (R., p. 663), but that is *not* the *final* balance. *The last credit of $52,500 and the last debit of $37,500 have* NOT *gone into that balance.*

This is easily shown. Add to the former balance of $339,064.14 the two credits of April 17 and subtract from that sum the five debits of April 6, 15, 17, 17 and 25 and the result is just $329,195.84 (R., p. 663).

The true balance is therefore $329,195.74 + $52,500 = $381,695.74 — $37,500 = $344,195.64 (R., p. 663).

It is true that the last credit of $52,500 and the debit of $37,500, at the bottom of page 663 are under date of May 15, and that no transaction occurred between the bank and the company after the twenty-fifth of April, but it is nevertheless easy to show that "May 15" *is but the date of the posting*, and that those two items represent the note transactions which occurred between February 14 (last time pass book was balanced before, R., fol. 1614) and April 25.

Here is the proof:

The credit item, $52,500, refers to folio 136 (R., p. 663) and so also does the debit item of $37,500. Folio 136 is given at pages 485–486. And it is

" Debit—
" 37,500 Bills Payable 9 N. S. Co. notes.
" 51,191.03 Fst. Nat. Bank
" 1,308.97 Int."
" Credit May, 1895.
" Fst. Nat. Bank $37,500.
" Bills Payable, 12 notes, $52,500."

The details of these items are given on the stub of the cheque book and printed at folios 1579–1581. The $37,500 is made up of nine notes, all of which came due in March, and the $52,500 of 12 notes made between the 20th February and the 28th of March.

The pass book shows the same (R., fols. 1616–1620).

This argument, therefore, if it be of any force at all, shows that the notes are *not* paid.

It is therefore quite unnecessary to urge the following:

1. *We have got the notes.* If they paid them, why did not they take them up?

2. *Mr. Pangburn has got a judgment.* It is for them to show that it is wrong. They do not show this by showing that it *may be* wrong.

Concede that the fact that the outstanding notes exceeding the credit balance by ten thousand dollars shows that two notes of $5,000 each have been paid, *that does not show* THAT IT WAS THESE TWO. *It may have been any other two of the remaining sixty-eight.*

3. But it does not show anything of the kind. If the notes were paid they must have been paid *by something*—a new note, or money, or goods. In any such case there would have been an entry of it. *But there is none.*

4. The whole Bills Payable account for that period is given (R., pp. 661–663). If these notes had been

paid they would necessarily have gone among the debits in that account. *We know they do not.* We know it by this. There are but six debit items of as much as $5,000. They are May 31, '94, $173,275.25; June 30, '94, $134,422.63; Nov. 30, $140,345.26; Feb. 28, 1895, $123,500; April 15, 10,000, and May 15, $37,500. We have the details of all these. They are printed at fols. 2053–2055, 1561–1563, 1567–1569, 1573–1575, 231–232,1579.

RESULT:

The Natchaug Company got the money for this note on the fifth of January, 1893 (R., fol. 1952).

It has never paid anything on it.

Exhibit K of 15 July represents the debt.

NOTE NUMBER FOUR.

This is the second (*Exhibit L*) of the two notes as to which the details have been given under *Note Number Three.*

NOTE NUMBER FIVE.

Date, 16 January, 1894.

(*Exhibit I of 15 July, fol. 1689.*)

On the tenth of May, 1893, the Natchaug Company made two notes, each for $5,000, at four months (R., p. 464).

Both of these notes were *discounted* by the bank and the proceeds put to the credit of the Natchaug Company in its deposit account (R., p. 571).

They were *not* paid (R., fol. 1083), but were kept by the bank.

They are now deposited with the clerk of the court under the order dissolving the injunction (post, Appendix, p. 37).

On the thirteenth of September, 1893, the Natchaug Company made two notes, each for $5,000, at four months (R., p. 463).

These notes were not discounted (R., p. 571), neither were they paid (R., fol. 1805), but they were kept by the bank.

They are now deposited with the clerk of the court under the order dissolving the injunction (post, Appendix, p. 37).

On the sixteenth of January, 1894, the Natchaug Company made two notes, each for $5,000, at four months (R., p. 467).

These are two of the notes on which Mr. Pangburn got his judgment, Exhibits I and J of 15 July (R., fols. 1689–90).

These notes were not discounted (R., p. 572), neither were they paid (R., fol. 1805).

There was *a* note of that date which *was* credited (R., p. 572) and charged (R., fol. 1562).

Mr. Angelo swears that it is one of *these* notes. I think we can show pretty clearly *that it is not.* The Natchaug Company made *three* notes on the sixteenth of January, 1894 (R., p. 467). *One* of these notes *was* credited (R., p. 572) and charged (R., fol. 1562). The bank kept these two, *but it did not keep all three.* The stub of the cheque book says that the one which was charged was *returned.*

"30, N. S. Co. Notes *Retd.* June 26, '94.

* * * * *

"Jan. 16, Due May 16, 19. 5,000.00." (R., fols. 1561–2.)

Of course if it was *returned* the bank *would not have it.* But these two notes *it did have.*

They were assigned to Mr. Pangburn and are two of the notes (Exhibits I and J of 15 July, fols. 1689–90) upon which he got his judgment (R., fols. 1762–3).

On the nineteenth of May, 1894, the Natchaug Company made two notes, each for $5,000, at four months (R., p. 469).

These notes were not discounted (R., 572, fols. 1538, 1570), neither were they paid (R., fols. 1579, 1806). They were kept by the bank.

They are now deposited with the clerk of the court under the order dissolving the injunction.

On the twenty-second of September, 1894, the Natchaug Company made two notes, each for $5,000, at four months (R., p. 471).

These notes were not discounted (R., p. 572; fols. 1551, 1572), neither were they paid (R., fols. 1580, 1808). They were kept by the bank.

They are now deposited with the clerk of the court under the order dissolving the injunction.

On the twenty-fifth of January, 1895, the Natchaug Company made two notes, each for $5,000, at four months (R., p. 473).

These notes were not discounted (R., p. 573; fols. 1578, 1580), neither were they paid (R., fol. 1808). They were kept by the bank.

They are now deposited with the clerk of the court under the order dissolving the injunction.

RESULT:

The Natchaug Company got its money for the note on the eleventh of May, 1893 (R., p. 572).

It has paid nothing.

Exhibit I of 15 July represents the debt.

NOTE NUMBER SIX.

This is the second (Exhibit J) of the two notes, the details as to which have been given under *Note number five.*

NOTE NUMBER SEVEN.

Date 18 January, 1894—four months, $2,500.

(*Exhibit H of 15 July, fol. 1688.*)

On the twenty-fifth of April, 1891, the Natchaug Company made its note for $2,500 at four months. This note

was discounted and the proceeds put to the credit of the Natchaug Company (R., p. 567).

It was not paid (R., fol. 1798).

It was kept by the bank.

It is now deposited with the clerk of the court under the order dissolving the injunction.

On each of the following dates:

28 August, 1891,
31 December, 1891 (R., p. 457),
3 May, 1892 (R., p. 458),
6 September, 1892 (R., p. 460),
9 January, 1893 (R., p. 462),
12 May, 1893 (R., p. 463),
15 September, 1893 (R., p. 465),

the Natchaug Company made a note for $2,500 at four months.

No one of these notes was discounted (R., pp. 569, 750, 571).

No one of them was paid (R., fols. 1799, 1880–1, 1802, 1803, 1805).

They were all kept by the bank.

All of them are now deposited with the clerk of the court under the order dissolving the injunction.

On the eighteenth of January, 1894, it made its note for $2,500 at four months (R., p. 467).

This is Exhibit H of 15 July (R., fol. 1688).

This note was not discounted (R., p. 572).

It was not paid (R., fols. 1806, 1562, 1567).

It was kept by the bank, assigned to Mr. Pangburn, and is one of the notes upon which he got his judgment (R., fol. 1764).

Upon each of the following dates:

21 May, 1894 (R., p. 469),
24 September, 1894 (R., p. 471),
26 January, 1895 (R., p. 473),

the Natchaug Company made its note for $2,500 at four months.

No one of these notes was discounted (R., pp. 472, 473; fols. 1538, 1551, 1565, 1572, 1578).

No one of them was paid (R., fols. 1806, 1808, 1574, 1579).

They were kept by the bank.

They are now deposited with the clerk of the court under the order dissolving the injunction.

RESULT

The Natchaug Company got the money for the note on the twenty-seventh of April, 1891 (R., p. 567).

It has not paid anything.

Exhibit H of 15 July represents the debt.

NOTE NUMBER EIGHT. Date 19 January, 1894—four months.

(*Exhibit G of 15 July, R., fol. 1687.*)

On the sixteenth of December, 1889, the Natchaug Company made its note for $5,000, at four months. This note was discounted and the proceeds credited to its account on that day (R., p. 565).

It was *not* paid (R., fol. 1795).

On the nineteenth of April, 1890, it made its note for $5,000, at four months. This note was not credited (R., p. 566).

Neither was it paid (R., fol. 1796).

On the twenty-second of August, 1890, it made its note $5,000, at four months. This note was credited on the 23d (R., p. 567).

It was *not* paid (R., fol. 1796).

On the twenty fourth of December, 1890, it made its note for $5,000, at four months. This note was credited on the 3d January, 1891 (R., p. 567).

And when it came due it was paid (R., fol. 1798).

On the twenty-eighth of April, 1891, it made its note

for $5,000, at four months. This note was credited on the 27th April (R., p. 568).

It was *not* paid (R., fol. 1798).

On the thirty-first of August, 1891, it made its note for $5,000, at four months.

This note was *not* credited (R., p. 569), and it was *not* paid (R., fol. 1799).

On the second of January, 1892, it made its note for $5,000, at four months (R., p. 457). This note was credited on the 16th January (R., p. 569).

It was *not* paid (R., fol. 1801).

On the fifth of May, 1892, it made its note for $5,000, at four months (R., p. 459). This note was *not* credited (R., p. 570), and it was *not* paid (R., fol. 1801).

On the eighth of September, 1892, it made its note for $5,000, at four months (R., p. 460). This note was *not* credited (R., p. 570), but notwithstanding that it had not been credited *it was* PAID (R., fol. 1802).

On the eleventh of January, 1893, it made its note for $5,000, at four months (R., p. 461). This note was credited on that day (R., p. 573), and it was *not* paid (R., fol. 1803).

On the thirteenth of May, 1893, it made its note for $5,000, at four months (R., p. 463). This note was credited on the 17th May (R., p. 571), and it was *not* paid (R., fol. 1803).

This note has been deposited with the clerk of the court under the order dissolving the injunction.

On the sixteenth of September, 1893, it made its note for $5,000, at four months (R., p. 465). This note was not credited (R., p. 571), nor was it paid (R., fol. 1805).

This note has been deposited with the clerk of the court under the order dissolving the injunction.

On the nineteenth of January, 1894, it made its note for $5,000, at four months (R., p. 467). This note was

not credited (R., p. 572), and it was not paid (R., fols. 1805, 1567).

This is *note number eight*, Exhibit G, one of the notes on which Mr. Pangborn got his judgment (R., fol. 1765).

On each of the following dates:

22 May, 1804 (R., p. 469),
25 September, 1894 (R., p. 471),
28 January, 1895 (R., p. 473),

it made its note for $5,000 at four months.

No one of these notes was credited (R., pp. 572, 573; fols. 1570, 1572, 1578).

No one of them was paid (fols. 1807, 1808, 1575, 1579).

They were all kept by the bank.

They have all been deposited with the clerk of the court under the order dissolving the injunction.

RESULT:

This series represents a debt of $25,000.

The Natchaug Company has received:

16 December, 1889	$5,000
22 August, 1890	5,000
24 December, 1890	5,000
29 April, 1891	5,000
2 January, 1892	5,000
11 January, 1893	5,000
13 May, 1893	5,000
	$35,000

It has paid—

28 April, 1891	$5,000	
11 January, 1893	5,000	$10,000
Balance		$25,000

NOTE NUMBER EIGHT—Exhibit G, of 15 July—represents $5,000 of this debt.

Of the *five* notes deposited with the clerk of the

court, under the order dissolving the injunction, but *one* should therefore be cancelled; since after taking out Mr. Pangburn's note, *there is twenty thousand dollars of debt left.*

Judge Lacombe, in his opinion says, "The Court has not overlooked the fact that it is doubtful whether the bank itself could have established any claim to No. 8."

This is because of the testimony at fol. 273, as to an endorsement upon the above note of 28 April, 1891, in these words, "Four thousand dolls. of this note be-"longs to H. E. Brainard.

"One thousand dolls. of this note belongs to O. H. K. Risley."

Assuming this to be true, it simply reduces the above debt of $25,000 to $20,000.

BECAUSE the notes of—

16 December, 1889,
22 August, 1890,
24 December, 1890,
2 January, 1892,
11 January, 1893,
13 May, 1893,

were all credited and none of them paid, making a debt of $30,000, against which is to be charged only the payment of the $5,000 on the eleventh of January, 1893. But we do not claim at all under the note of 28 April, 1891.

Either of the notes of 2 January, 1892, 11 January, 1893, or 13 May, 1893, will support note number 8. They can keep the note of 28 April, 1891. It will not affect the case in the least.

These facts were not before Judge Lacombe. He had nothing before him but the table at folio 436 and the Bill Book (R., p. 457).

NOTE NUMBER NINE—Date 26 January, 1894—four months.

(*Exhibit E of 15 July—fol. 1685.*)

On the twenty-sixth of April, 1890, The Natchaug Company made its note for $5,000, at four months. This note was credited 28 April (R., p. 566), and it was *not* paid (R., fol. 1796).

On the 29th August, 1890, it made its note for $5,000, at four months (R., p. 567). This note was credited on that day (R., p. 567) and it was *not* paid (R., fol. 1796), but was kept by the bank (R., fol. 1975).

On the thirtieth of December, 1890, it made its note for $5,000, at four months (R., fol. 1977, p. 567). This note was credited on the 31st (R., p. 567), and it was *not* paid (R., fol. 1798), but was kept by the bank (R., fol. 1977).

On the second of May, 1891, it made its note for $5,000, at four months (R., fol. 1978). This note was credited on the seventh of May (R., p. 568), and it was not paid.

This note is stamped "paid," as is also the preceding note of 29 August, 1890, and the subsequent note of 5 September, 1891, but it is plain that they were *not* paid.

1. There are no corresponding payments on the due dates *except this one, of which presently* (R., fols. 1796, 1799).

2. The notes were not delivered but kept.

3. The stamp is as paid 12 Jan., 1891 (R., fols. 1978, 1980). No notes were paid on that day (R., fol. 1797), and it is months before the notes were made.

As to this particular note, there is on the Bank Journal an entry of the payment of a note on the 5th September, 1891, the due day of this note (R., fol. 1799).

That that was a note of the series of *note number*

ten, and *not this* note, will be shown under *note number ten*.

The note in question, was not paid, *but was kept—and we have got it* (R., fol. 1978).

On the fifth of September, 1891, it made another note for $5,000, at four months (R., fol. 1980). This note was not discounted (R., p. 569) and it was not paid (R., fol. 1799). It was kept by the bank.

On the eighth of January, 1892, it made another note for $5,000, at four months (R., p. 457, fol. 1981). This note was discounted (R., p. 659), and it was not paid (R., fol. 1801). It was kept in the bank (R., fol. 1981).

On the eleventh of May, 1892, it made another note for $5,000, at four months (R., p. 459, fol. 1982). This note was not discounted and it was not paid (R., fol. 1801). It was kept in the bank (R., fol. 1981).

On the fourteenth September, 1892, it made another note for $5,000, at four months (R., p. 460, fol. 1984). This note was not discounted (R., p. 570),

The discounted note of that date we charge to number ten.

and it was not paid (R., fol. 1802). It was kept in the bank (R., fol. 1984).

On the seventeenth of January, 1893, it made another note for $5,000, at four months (R., p. 462), fol. 1985). This note was not discounted (R., p. 570), and it was not paid (fol. 1083).

This and the two following notes were discounted by the Windham County National Bank of Brooklyn (R., fols. 1986, 1987). Whether this and next one were paid by the First National Bank, we do not know. But the last one was, as will presently appear.

On the twentieth of May, 1893, it made another note for $5,000, at four months (R., p. 463, fol. 1987). This note was *not* discounted (R., p. 571), and it was not paid (R., fol. 1083).

On the twenty-third of September, 1893, it made another note for $5,000, at four months (R., p. 465). This note was not discounted (R., p. 571). It was discounted by the Windham County National Bank of Brooklyn,

See the note itself, which is deposited with the clerk, under the order dissolving the injunction.

and it was paid by the First National Bank to the Windham County Bank (R., fols. 2056-8). There is no corresponding charge to the Natchaug Company, and accordingly the transaction amounts to a *buying of the note. Accordingly we have got it.*

On the twenty-sixth of January, 1894, it made another note for $5,000 at four months (R., p. 467). This is *note number 9* (Exhibit E of 15 July, fol. 1685), and is one of the notes upon which Mr. Pangburn got his judgment (R., fol. 1766). It was not discounted (R., p. 572) nor was it paid (R., fol. 1806), but it was kept by the bank and accordingly we have got it (R. fol. 1685).

On each of the following dates:

29 May, 1894 (R., p. 469),
2 October, 1894 (R., p. 471),
5 February, 1895 (R., p. 473),

it made its promissory note for $5,000, at four months. No one of these notes was discounted (R., pp. 572–3; fols. 1538, 1551, 1570, 1572, 1579). No one of them was paid (R., fols. 1807, 1808, 1573, 1579). They were kept in the bank.

They are now on deposit with the clerk of the court under the order dissolving the injunction.

RESULT:

The Natchaug Company has received:

1890. April 28	$5,000
August 29	5,000
December 30	5,000
1891. May 7	5,000
1892. Jany. 12	5,000
1894. Jany. 26 (Pd. to Windham County)	5,000
	$30,000

It has not paid anything.

Exhibit E of 15 April represents $5,000 of this debt.

Five notes of this series should therefore be left uncancelled.

NOTE. The notes composing the series of *note number nine* and *note number ten* are identical in dates and amounts. Down to and including the notes dated 2d May, 1891, both series are discounted (R., p. 568). After that the series of *number nine* drops out, except the one note of 8th January, 1892, above. The series of *number ten* continuing to be discounted, and occasionally paid down to the note dated Sept. 16, 1892. Then it drops out, as will appear under *note number ten.*

NOTE NUMBER TEN.

Date 26 January, 1894, four months.

(*Exhibit F of 15 July, fol. 1686.*)

On the twenty-sixth of April, 1890, the Natchaug Company made its note for $5,000 at four months (R., fol. 1989). This note was discounted on the seventeeth of May, 1890 (R., p. 566), and was sold (R., fol. 1795) to the Continental Bank of New York (R., fol. 1990). Whether or no it was paid by the First National Bank we do not know. The note is marked "paid."

On the twenty-ninth of August, 1890, the Natchaug Company made its note for $5,000 at four months (R., fol. 1991). This note was discounted on the same day (twenty-ninth August, 1890, R., p. 567), marked "paid Jan. 13, 1891, and perhaps it was, as there was $14,850 charged to the account on that day (R., fol. 1797), of which this may have been part. Also it may not have been, and we find it in the bank.

On the thirtieth of December, 1890, it made its note for $5,000 at four months (R., fol. 1993). This note was discounted on the third of January, 1891 (R., p. 567, and it

was not paid (R , fol. 1798), but was kept in the bank (R., fol. 1993).

On the second of May, 1891, it made its note for $5,000 at four months, which was discounted on the tenth of June, 1891 (R., p. 568). This note was paid (R., fol. 1799).

No renewal note appears to have been made for this series, on the fifth of September, 1891; the one which is found in the books of that date has been described as of the series of number nine above.

On the eighth of January, 1892, it made its note for $5,000 at four months (R., p. 457, fol. 1994). This note was discounted on the sixteenth of January, 1892, was sold on the fourth of May, 1892 (R., fol. 1801), to the Continental Bank (R., fol. 1995). It was paid (R., fol. 1801).

On the eleventh of May, 1892, it made its note for $5,000 at four months (R., p. 459, fol. 1996). This note was discounted—

May 10 (R., p. 571). There were no notes of May 10 (R., p. 458). So this must be a mistake for May 11.

and it was not paid (R., fol. 1801). It was kept in the bank (fol. 1996).

On the fourteenth of September, 1892, it made its note for $5,000 at four months (R., p. 460; fol. 1997). This note was discounted on the fifteenth of September (R., p. 579), and it was not paid (R., fol. 1802). It was kept in the bank (R., fol. 1977).

On the seventeenth of January, 1893, it made its note for $5,000 at four months (R., p. 462). This note was discounted on the sixteenth of January, 1893 (R., p. 570), and was not paid (R., fol. 1083). This note is deposited with the court, under the order dissolving the injunction (which see, Appendix, p. 37).

On the twentieth of May, 1893, it made its note for $5,000 at four months (R., p. 464). This note was not

discounted and it was not paid (R., fol. 1803). It was kept in the bank, and is now deposited with the court, under the order dissolving the injunction (which see).

On the twenty-third of September, 1893, it made its note for $5,000 at four months (R., p. 465). This note was not discounted and it was not paid (R., fol. 1805). It was kept in the bank and is now deposited with the court, under the order dissolving the injunction (which see).

On the twenty-sixth of January, 1894, it made its note for $5,000 at four months (R., p. 467). This is Exhibit F of 15 July (R., fol. 1686), and is one of the notes upon which Mr. Pangburn got his judgment. It was not discounted (R., p. 572), and it was not paid (R., fols. 1806, 1562), but it was kept in the bank, and accordingly we have got it (R., fol. 1686).

On each of the following dates:

29 May, 1894 (R., p. 469),
2 October, 1894 (R., p. 471),
5 February, 1895 (R., p. 473),

it made its promissory note for $5,000 at four months. No one of these notes was discounted (R., pp. 572, 573; fols. 1538, 1551, 1570, 1572, 1579). No one of them was paid (R., fols. 1807, 1808, 1573, 1579). They were kept in the bank.

They are now on deposit with the clerk of the court under the order dissolving the injunction.

RESULT:

The Natchaug Company has received—

1890, May 17	$5,000
August 29	5,000
December 30	5,000
1891, May 2	5,000
1892, January 16	5,000
May 11	5,000
September 15	5,000
1893, January 16	5,000
	$40,000

It has paid—

1890, August 29	$5,000 (?)	
1891, January 13	5,000 (?)	
September 5	5,000	
1892, May 11	5,000	20,000
Balance		$20,000

Exhibit F of 15 April represents $5,000 of this debt.

Three notes of this series should therefore be left uncancelled.

NOTE NUMBER ELEVEN.

Date 29th January, 1894, $5,000.

(*Exhibit D of 15 July, fol. 1684.*)

All the notes of this series are deposited with the clerk of the court under the order dissolving the injunction (*which see post*, Appendix, p. 37).

On the third of January, 1891, the Natchaug Company made its note for $5,000 at four months. This note was discounted 13 January (R., p. 568). It was not paid (R., fol. 1798). It was kept in the bank.

On the sixth of May, 1891, it made its note for $5,000 at four months. This note was not discounted (R., p. 568). It was not paid (R., fol. 1799). It was kept in the bank.

On the ninth of September, 1891, it made its note for $5,000 at four months. This note was not discounted (R., p. 569). It was not paid. It was kept in the bank.

On the twelfth of January, 1892, it made its note for $5,000 at four months (R., p. 457). This note was not discounted (R., p. 569), and it was not paid (R., fol. 1801).

On the fourteenth of May, 1892, it made its note for $5,000 at four months (R., p. 459). This note was not

discounted (R., p. 570). It was not paid. It was kept in the bank.

On the seventeenth of September, 1892, it made its note for $5,000 at four months (R., p. 460). This note was not discounted (R., p. 570). It was not paid. It was kept in the bank.

On the twentieth of January, 1893, it made its note for $5,000 at four months (R., p. 462). This note was not discounted (R., p. 570), and it was not paid, but kept in the bank.

On the twenty-third of May, 1893, it made its note for $5,000 at four months. This note was not discounted (R., p. 571), and it was not paid. It was kept in the bank.

On the twenty-sixth of September, 1893, it made its note for $5,000 at four months (R., p. 465). This note was not discounted (R., p. 571), and it was not paid. It was kept in the bank.

On the twenty-ninth of January, 1894, it made its note for $5,000 at four months (R., p. 467). This note was not discounted (R., p. 572), and it was not paid (R., fol. 1806, fols. 1569, 1573).

This note is Exhibit D.—NOTE NUMBER ELEVEN (R., fol. 1684), *and is one of the notes on which Mr. Pangburn got his judgment.*

On each of the following dates: the 1 June, 1894 (R., p. 469); the 4 October, 1894 (R., p. 471); the 7 February, 1895 (R., p. 473), it made its note for $5,000 at four months.

None of them was discounted (R., pp. 572, 573, 1593, 1605, 1615, 1572, 1522, 1525), and none of them was paid (R., fols. 1562, 1569, 1579).

RESULT:

The Natchaug Company received 13 January, 1891, $5,000. It has paid nothing.

Exhibit D represents the debt.

All of this series may be cancelled.

As already stated, all are deposited—except, of course, Exhibit D itself.

Note Number TWELVE.

Date 29 January, 1894, $5,922.63.

(*Exhibit C of 15 July, fol. 1683.*)

All of the notes of this series are deposited with the clerk of the court under the order dissolving the injunction.

On the ninth of September, 1891, the Natchaug Company made its note for $5,922.68 at four months (R., 457). This note was discounted on the seventeenth of September, 1891 (R., p. 569). When it came due it was not paid (R., fols. 1799–1800). Renewals were regularly made for it 12 January, 1892 (R., 457); 14 May, 1892 (p. 459); 17 September, 1892 (p. 460); 20 January, 1893 (p. 462); 23 May, 1893 (p. 464); 26 September, 1893 (p. 465); 29 January, 1894 (p. 467);

This is Exhibit C of 15 July.

1 June, 1884 (R., p. 469); 4 October, 1884 (p. 471); and 7 February, 1895 (p. 473).

No one of these was discounted (pp. 569, 570, 571, 572, 573; fols. 1592, 1605, 1614, 1620; fols. 1570, 1572, 1578, 1580; fol. 1549).

No one of them was paid (R., fols. 1801, 1802, 1803, 1805, 1806, 1807, 1808; fols. 1562, 1577, 1579).

All were found in the bank and, with the exception of course of Exhibit C itself, all are now deposited with the clerk of the court under the order dissolving the injunction.

Exhibit C of 15 July represents the debt.

NOTE NUMBER THIRTEEN.

Date 15 December, 1894, $1,000.

(*Exhibit B of 15 July, fol. 1682.*)

This note was originally discounted 12 November, 1890.

Renewals were issued and regularly credited and charged down to this one, which was credited and not charged.

No dispute was made about this and the details are therefore not given.

NOTE NUMBER FOURTEEN.

Date 12 January, 1895, $5,922.63.

(*Exhibit A of 15 July, fol. 1681.*)

This note was originally issued ninth September, 1891 (R., p. 457).

Renewals were regularly issued, and discounted down to and including this one, which was also discounted, and no renewal was issued and it has not been paid.

This is not questioned, but the attention of the Court is called to fact that the following notes of this series, though discounted, were not paid: 12 December, 1891 (R., p. 569; fol. 1797), and 15 March (R., p. 570; fol. 1801).

This series therefore represents a debt of $15,000.

NOTE NUMBER FIFTEEN.

Note of Olon S. Chaffee. Date 26 January, 1895, $2,250. Endorsed by the Natchaug Silk Company and protested 29 May, 1895, for non-payment.

(*Exhibit O of 15 July, fols. 1695–8.*)

It was as to this note that Mr. Hayden gave the testimony which is printed at folios 279–289. I therefore give the detail.

The original note of this series was a note of O. S. Chaffee & Son, dated 12 Aug. 1889, and discounted for the Natchaug Silk Company 15 August 1889 (R., p. 565).

It was renewed by a note of 14 December, 1889. On the 17 April, 1890, a note of O. S. Chaffee was substituted for this endorsed by the Natchaug Silk Company and discounted for it. This note was regularly renewed until the note in question, which was the last, each being when it came due regularly charged to the account of the Natchaug Silk Company and the proceeds put to its credit (R., pp. 565, 566, 567, 568, 569, 570, 571, 572 and 573; fols. 1793, 1795, 1796, 1797, 1798, 1799, 1801, 1802, 1806, 1807 and 1808).

The proofs are therefore exactly the same in kind and effect as they were before Judge Lacombe. There were then (1) Mr. Dooley's affidavit, with schedule of notes (R., fols. 433–438), showing the note originally credited for each series and renewals issued down to and including the Pangburn notes with (2) proof that none of the Pangburn notes had been discounted except numbers 13, 14 and 15 (R., fols. 295–297); (3) that renewals had been issued for all except numbers 3, 4, 13, 14 and 15 (fols. 259–269) and (4) that none of those renewals had been discounted, except those of the series of *number one* (R., fols. 1564–1580). *The proof is exactly the same now.*

For instance, it was shown before Judge Lacombe, as to the series of note *number five*, and is shown now, as follows:

1893, May 10, original note discounted and not paid.

1893, September 13, renewal note made and delivered to the bank, but not discounted—not paid, but just kept.

1894, January 16, renewal note made and delivered to the bank, but not discounted—not paid, but just kept.

1894, May 19, renewal note made and delivered to the bank, but not discounted, not paid, but just kept.

1894, September 22, renewal note made and delivered to the bank, but not discounted, not paid, but just kept.

1895, January 25, renewal note made and delivered to the bank, but not discounted, not paid, but just kept.

The fact that the notes were not discounted was then shown by Mr. Dooley's testimony (fols. 438, 444).

The proof of the rest was the books—the same then as now.

Here is a series of five notes, of which the first was discounted and not paid, and remains still unpaid. Regularly every four months a renewal note is sent over to the bank and nothing is done with it, but it is kept. This goes on until the bank holds *five* notes for the same debt. Nothing paid. *It sells the middle one of the series.* Judge Lacombe held that this transferred the debt.

And it is clearly so.

The variation is in the case of number *one*, where the note, *which was afterwards sold*, was, when it became due, *charged* to the account, although it had *not been credited.* The subseqent renewals were also all credited, and, *except the last one*, charged. Judge Lacome held that since the last one had not been charged, *nothing had been really paid*, which is plainly so, since the credits and charges were equal, *afer the original credit*, and thus the case was not varied from the rest.

The bank had all this time more than one hundred and forty thousand dollars of overdue paper. Of course they must have live paper to use as occasion required. But if it could use any of the notes it could use any one of them, whichever it pleased; and if it could use any one it pleased, in any way, it could *sell it*, and thus convey so much of the actual debt.

A good deal of the evidence showing these facts was objected to. Let us assume that the objections were well taken.

It will not make any difference.

The case will then stand on Mr. Dooley's affidavit and schedule (fol. 438), as it did before Judge Lacombe. They have not shown anything to the contrary of that.

NINTH HEAD.—Proofs as to the attachments.

Attachments which were delivered to the Sheriff of New York, were issued as follows:

29 April, 1895, Morimura, Arai & Co., Exhibit 46 of complainant's exhibits (R. p. 289).

2 May.—The 62 cases of silk were moved from New York to Brooklyn.

16 May.—Rice, Exhibit 47 of complainants' exhibits (R. p. 290).

18 May.—Dooley, Exhibit 29 of complainants' exhibits (R. p. 272). As this was granted in Schenectady (R. p. 273) it could not have been in New York until the next day which was a Sunday (the twenty-first was a Tuesday, R. p. 205), and therefore could not have been delivered to the Sheriff until the Monday, which was the 20th May.

21 May.—The Heddens (the complainants), Exhibit 45 of complainants' exhibits (R. p. 288).

25 May—(a Saturday)—the 45 cases of silk were moved from New York to Brooklyn.

1 June—(a Saturday)—the Pangburn attachment (Exhibit 30 of complainants' exhibit, R. p. 273) was issued and on the 3rd June was delivered to the Sheriff of Kings who on that day levied under it upon all of the 107 cases of silk—the 62 which had been moved from New York to Brooklyn on the 2nd May as well as the 45 cases which had been moved from New York to Brooklyn on the 25th of May.

6 June.—The attachment of the Heddens—the complainants, was delivered to the Sheriff of Kings (R. p. 194).

The whole of the silk had, of course, been in the possession of Mr. Dooley in New York, ever since his appointment as receiver 23rd April, 1895—that is to say, it was in Adams' store at 77 Greene Street—to which it had been shipped from Willimantic.

One Thompson was Adams' manager. It was he who had received the silk, and had insured it in the name of the First National Bank of Willimantic.

And of course it was by Mr. Dooley that the silk was moved from New York to Brooklyn—the 62 cases on the 2nd May and the remaining 45 cases on the 25th May.

Evidence was given by the deputy sheriff of New York county who had the matter in charge as follows (italics mine)—

"HUGH WHORISKEY, a witness called on behalf of the "plaintiffs, being duly sworn, testified as follows:

"*Direct examination by Mr. Twombly:*

"Mr. Whoriskey, you are the Deputy Sheriff? A. "Yes.

"Q. And were so during the year 1895? A. Yes; "during the time this thing was in execution.

"Q. I show you a warrant of attachment: Plaintiffs' Ex- "hibit 47.* When was that received in the Sheriff's "office? A. That was received May 21st.

"Q. Do you know whether or not a copy of that war- "rant was delivered to John H. Thompson, on or about "the 21st day of May, 1895? A. Yes.

"Q. Any goods taken possession of at that time? A. "No.

"Q. Do you know whether or not Mr. Thompson said he had in his possession goods belonging to the Natchaug "Silk Company? A. In fact, the place was closed up at "that time—except that Mr. Thompson was served out- "side. The place was not closed up at any time till I "took the goods out.

"Q. Did you see Mr. Thompson again with reference "to this attachment? A. Yes.

"Q. What conversation took place between you at that "time? A. Mr. Thompson pointed out the goods I "thought belonged to the Natchaug Silk Company, "which was claimed under the attachment, which he did "not claim, at the time, belonged to the Natchaug Silk "Company, but he said they belonged to D. E. Adams.

"Q. He pointed out certain goods which belonged to "the Natchaug Silk Company? A. Which I thought I "had a right to levy on under the attachment.

"Q. What did he say about them? A. Claimed they "belonged to D. E. Adams.

"Q. And did you take those goods? A. Not then, no.

"Q. Did you leave a copy of the warrant of attachment "with him? A. Left a copy of the warrant of attach- "ment, and also a man in charge.

"Q. On what date was that? A. I can not tell about "the dates correctly, but that was the Monday morning "after the attachment was served, whatever that Monday

* Exhibit 47 was the *Rice* attachment, *not* the Heddens (R. p. 290).

"morning was—or two days after this thing was attached.
"*It was Saturday this thing was attached. I put a man*
"*in charge on Monday. The levy was made on Saturday.*
"*Q. When was the attachment given to you? A.*
"*Saturday morning.*
"Q. Will you look at the date and see? A. It was May
"21st.
"Q. Now, the 21st was Tuesday. Now, when was the
"levy made? A. Most decidedly the levy was made on the
"same day—21st.
"Q. When did you put your man in charge? A. On
"the Saturday afternoon. At once, after your attachment
"was issued.
"Q. *Was there another attachment in the suit of*
"*Michael F. Dooley against the Natchaug Silk Com-*
"*pany?* A. *I forget anything at all about the attach-*
"*ments. I know we put a man in charge on Saturday*
"*afternoon.*
"Q. You do not know whether it was the 18th or
"25th? A. *Most likely it was the 18th. I cannot*
"*remember all the attachments for a year back.*
"Q. Did you put a man in charge under the Rice at-
"tachment? A. I could not tell which one I put the man
"in charge of—but it was on a Saturday.
"Q. It was on a Saturday? A. Yes.
"Q. When did you take the goods out of the store—
"that you did take out? A. I got a bond. You people
"gave me a bond on your attachment, and so did the
"other parties give me a bond, and after the thing had
"been all through I took the goods out.
"Q. When did you take the goods out? A. I cannot
"tell you.
"Q. I show you Exhibit 48. When did that execution
"come into your hands? A. On June 27th; 11:21.
"*Mr. Twombly:* I also offer in evidence warrant

" of attachment in case of Michael F. Dooley, as
" Receiver of the First National Bank, against the
" Natchaug Silk Company, dated May 18th, 1895.
" Received and marked Plff's. Ex. 49. Apl. 24.
" (R. p. 293.)

" Q. Did you receive the attachment of Michael F.
" Dooley against the Natchaug Silk Company on or about
" the 18th of May? A. On the 18th; yes.

" *By Mr. Paige:*

" Q. Before the Hadden attachment? A. Yes.

" Q. Who was the man you put in charge? A. A man
" named William J. Mackey.

" Q. And after he was put in charge, he stayed there? A.
" He stayed there until I come there and found that the
" property did not belong to the Natchaug Silk Company,
" and I took him out on Monday morning.

" Q. After your man was put in charge, no goods were
" taken away? A. Not as long as my man was in charge.

" Q. After your man was put in charge, no goods were
" taken away except by you? A. Not until I removed
" the man.

" Q. Then you took them away? A. I did not.

" Q. You finally took them? A. I did.

" Q. But nobody else took any goods? A. I do not know.

" Q. Does the man know? A. No; he was taken out
" Monday morning.

" Q. Did you put anybody else in his place? A. Certainly
" not.

" Q. What did the man do while he was there? A.
" Stayed there night and day. He stayed there from
" Saturday until Monday morning—night and day, all the
" time.

" Q. Have you no means of telling what day that was?
" A. *It was on the 18th we put the man in charge. I do*

"*not know anything about the dates. I think it was on* "*the 18th, on this other attachment.*

"Q. But you do not know anything about the dates? "A. Whatever day Saturday was. That is all I remem- "ber.

"Q. And the man stayed there until the following Mon- "day? A. Yes.

"Q. The man, when he was put in charge, stayed there, "night and day, until Monday—until you removed him? "A. Yes.

"Where is that man? A. I had him down here yester- "day afternoon.

"Q. Now, what do you mean by 'making a levy'? "What did you do before you put the man in charge? A. "What do you mean by 'making a levy'?

"Q. You said, a moment ago, you made a levy. A. "The very fact of going into the room makes a levy. I "went into the place and gave the paper to Mr. Thomp- "son—served Mr. Thompson.

"*By Mr. Twombly:*

"Q. You did not touch the goods, did you? A. I did "not see them. There were none to touch at that time. "We took charge of the thread and everything else.

"Q. All the goods that were in the place? A. All the "goods that were in the place.

"Q. You took them into your possession? A. Took them "into our possession—not before the man was there.

"Q. Then the man was taken away on Monday, you "say? A. Yes.

"Q. And after that, Hadden & Company gave a bond "to the sheriff, and then you went up and took the goods "out of the place? A. Yes.

"*By Mr. Paige:*

"Q. You afterwards sold the goods? A. Yes.

"*By Mr. Twombly:*

"Q. Was there anybody in No. 77 Greene street, be-
"tween the time when you took your man out of No. 77
"Greene street and the time when you went up, yourself,
"and took the goods out? You say you took the man
"out Monday? A. I think so; yes.

"Q. Was anybody in that place from the time you took
"your man out until you went up, yourself, and took the
"goods? A. It could not be possible. No.

"*By Mr. Paige:*

"Q. Don't you keep any record of when you put a
"man in charge—any written record—which would show
"dates? A. Don't keep a record when we put a man in
"charge.

"Q. Don't you keep a written record, somewhere, when
"you put a man in charge of the store? A. No; except
"that we give a deputation to the man. Here is a copy
"of it. (Witness hands Mr. Paige paper.) We furnis
"our keepers with a deputation.

"Q. Have you such a paper of the deputation of Mr.
"Mackey? A. Yes; most decidedly. He has got it."

The case was argued on the merits, with proof before the court each time that the complainants' attachment was issued by the court on the 21st May, and that the 45 cases had been moved to Brooklyn on the 25th May, as follows:

1. On the first motion to dissolve the injunction before Mr. Justice Stover of the Supreme Court of New York—*two* counsel for complainants.
   8 June, 1895.

2. On the second motion to dissolve the injunction—before Judge Lacombe—*two* counsel for complainants.
   12 August, 1895.
3. On the third motion to dissolve the injunction—before Judge Lacombe—*two* counsel for complainants.
   27 August, 1895.
4. On the fourth motion to dissolve the injunction—before Judge Lacombe, *two* counsel for complainants.
   22 November, 1895.
5. Before the Court of Appeals on the appeal from the order continuing the injunction—*one* counsel for the complainants May, 1896.
6. On the fifth motion to dissolve the injunction—before Judge Lacombe—*two* counsel for the complainants.
   August, 1896.
7. On the complainants' petition for a rehearing of that motion—before Judge Lacombe—*two* counsel for complainants.
   December, 1896.
8. On the motion to open the proofs—before Judge Lacombe—*one* counsel for complainants.
   March, 1897.
9. On the final hearing—Judge Coxe—*two* counsel for complainants.
   November, 1897.
10. On the appeal before the Court of Appeals—*three* counsel for complainants.
    15 November, 1898.

Upon none of these ten hearings did any of the counsel for the complainants raise the question upon which the Court af Appeals decided the case. (R., pp. 718–719).

The pleadings.

The original complaint, served in the Supreme Court of New York.

"That said Dooley, without lawful right or title, took "possession of said goods and secretly removed part "thereof, first, to a store house in New York City and "later to the store house of the Brooklyn Storage and "Warehouse Company, in Brooklyn in the County of "Kings; that on the 25th of May, said Dooley secretly "removed the remaining boxes of silks to the said storage "of the Brooklyn Storage and Warehouse Company, "where all the said silks, to the number of one hundred "and seven boxes, were placed in the name of the "attorney of said Dooley."

(R., pp. 3–4.)

and that on the 21st of May, 1895, the plaintiffs' warrant of attachment "was issued to the Sheriff of New York "County."

(R., p. 5.)

On the 14th January, 1897, (R., p. 22.) *with the proofs on this subject all in*, and after *seven* of the above arguments on the merits the complainants, by leave of court, filed their amended bill.

In this amended bill *they omitted all of the above allegations*—and the only allegations about the attachments are that Pangburn obtained an attachment on the first of June and levied upon the silk in Brooklyn (R., pp. 16–17) and the following.

"That on the 21st of May, 1895, an attachment was "granted against The Natchaug Silk Company, in a suit "in the Supreme Court, New York County, brought by "these plaintiffs against The Natchaug Silk Company, to "recover $22,766.48, and a warrant of attachment was "issued to the Sheriff of New York; that subsequently

"and on the 6th day of June, 1895, a warrant of attach-
"ment was issued in said suit to the Sheriff of Kings
"County; and thereunder said Sheriff levied upon the
"said 107 boxes of silks in the storehouse of the Brooklyn
"Storage and Warehouse Company and now has the same
"in his possession and custody" (R., p. 17).

There is not a word in it about the silk being in New York on the 21st of May or about its removal to Brooklyn.

TENTH HEAD: The false representations as to the condition of the Natchaug Company.

The complainants put in evidence certain statements of the condition of the Silk Company (R., pp. 257–258).

The one of December, 1894, shows the company to be about one hundred thousand dollars better off than it really was—and the complainants swear that it was in reliance on this statement that they made their sales on credit.

Chaffee swore that these statements were made up by Risley—but there is no proof that the complainants knew this—much less that they relied upon it—and the statements themselves purport to be those of the Natchaug Company.

BRIEF OF THE ARGUMENT.

I.

The First National Bank of Willimantic owned the silk, and Mr. Dooley, as the Receiver of the property of that bank, now owns it.

Upon this issue the Circuit Court of Appeals, when the case was first before it, 12 May, 1896, upon appeal from the order continuing the injunction, said (*post* Appendix, p. 3):

"The first is, that Chaffee, as president and general "manager of the Silk Company, *which was in fact and* "*must have been known by him to be insolvent*, had no "authority to sell a large portion of the personal property "of the company to one of its creditors in part payment "of its debt. *The decisions of the State of Connecticut* "*apparently recognize that a president and unlimited* "*general manager of its manufacturing corporations,* "*is vested with such power and that such a transfer of* "*personal property is valid*, but the complainants assert "that by the general commercial law, a general manager "of a private corporation is not clothed with this power.

"The second is that the notes which were sold to Pang- "burn had been paid by the Silk Company by renewals "which were not sold to him. *The answer to the first* "*question, which, as presented, is one of law, may be* "*controlled by the facts which may subsequently appear* "*as to any limitation of Chaffee's actual powers of which* "*the bank had knowledge.*"

A summary of the facts is as follows:

The powers of the general manager were defined by a by-law, thus:

"The Board of Directors shall annually elect a general "manager, *who shall have entire charge of the business "and affairs of the company*, subject to the order and "approval of the Board of Directors."

It appeared Mr. Chaffee was general manager from the beginning of the life of the company, and as such had always controlled and managed all its affairs, the directors never acting in any instance either by way of "order" or "approval," and, in particular, that he had disposed of all the silk manufactured by the company, during the whole of its life, selling it or turning it out for debts as he thought proper (ante. pp. 16, 19, 20). All this without question or even inquiry on the part of anybody.

He was also always president, with the exception of one year, which was of a time which does not relate to matters concerned in this case.

These being his powers, he, on the first day of January, 1890, agreed with the bank to assign to it, as security, certain silks of the value of $26,610.24, and to keep them apart in cases, with the agreement to replace what he took out of the cases, and under his direction the bookkeeper made a written assignment of the silks, which was delivered to the bank.

On the 13th and 15th of January, 1894, the indebtedness of the bank being over three hundred thousand dollars, he agreed to assign to the bank silks to the value of $66,270.04, to keep them for the bank in a locked vault and a locked room, which latter was built for the purpose; that the cashier of the bank should have the combination of the lock of the vault and a key to that room. This was done—the silk in the cases was put into the vault and room and two assignments were made to the bank and delivered to it—one of the silk in the vault and the other of the silk in the room. These assignments were executed on the part of the bank by Chaffee and Fenton, the

treasurer, who was also a director, and delivered to the bank. Thus three of the directors of the Silk Company were concerned in this transaction, Chaffee, Fenton and Risley, and thus the transfer had the approval of a majority of the directors.

About the fourteenth of April, 1896, the directors of the bank demanded of Chaffee, that the silk should be removed to a place where it should be entirely under their control, and it was agreed between the officers of the bank and Chaffee, and one of his directors on the part of the Silk Company, that the silk should be shipped to Adams in New York for account of and as in the possession of the bank. They threatened to shut up his company else. Chaffee accordingly shipped the silk to Adams, and advised Adams that it was for account of the bank, and Adams was directed to insure the silk in the name of the bank, which he did.

On the twenty-third of April, Chaffee executed in New York, on the part of the Natchaug Silk Company, two assignments of the silk, and delivered them to the counsel for the bank, and Adams executed a paper acknowledging that he held the silk for and as the agent of the bank. Before doing this, and on the preceding day, Chaffee says he informed two of the directors personally of what he was going to do, and that they agreed to it, and that he informed a third director by letter. One of them denies this, but the other two do not. Three directors therefore, a majority, approved it: one of these three, however—Fowler—was also a director of the bank.

On the twenty-ninth he called the board together, four members being present, and asked them to approve of his action. Two of them declined to act at all as directors for the reason that as a receiver had been appointed,

The receiver had been appointed on the twenty-sixth, *since* the assignments in New York.

they thought it safer not to act as directors at all, and

they did not hold any meeting then, and have held none since. But none of them disapproved of it, then nor since.

NOR DID ANY OF THEM RESIGN THEN OR SINCE.

I. It thus appears that the proofs do not show "any "limitation of Chaffee's actual powers of which the bank "had knowledge,"—but the contrary—that his powers were full and express.

Since that decision was made opinions upon similar transfers by Chaffee have been delivered as follows:

In *Dooley* vs. *Pease*, by the Circuit Court for the Northern District of Illinois and the Court of Appeals for the Seventh Circuit (*post*, Appendix, 11, 29).

In *Hadden* vs. *Linville*, by the Court of Appeals of Maryland (post Appendix, 13) and by the Court of Appeals below, reversing its former opinion (R. p. 713).

All of these cases say that Chaffee had the power to pay the debts of the company by transfers of silk, *while the company was "a going concern,"* but that he had no power "to pledge the *bulk* of the company's stock of "goods to a creditor on the eve of a receivership" and that this could only be done by the authority of the directors. *All of them, however, say that it could be done by authority of the directors.*

II. *Chaffee's transfer was within his power and good.*

Certain facts here need to be remembered.

In the *first* place there is not a particle of proof that the silk thus transferred, by all of Chaffee's three transfers I mean, was the *bulk* "of the company's stock of goods." On the contrary *it may be* that it was less than one-fourth of the whole, the rest going to the receiver in Connecticut.

In the *next* place it is the fact that the company had been hopelessly insolvent ever since 1891—four years. Indeed, it is the fact, that its then condition was materially *better* than it had been in 1891.

It is the law in Connecticut that it is a corporation's right and it is its duty to pay a debt. The fact that it operates to prefer the particular creditor paid makes no difference. *Smith* vs. *Skeary*, 47 Conn., 47, the text of the opinion in which will be quoted presently.

With these matters in mind let us read the by-law:

"The Board of Directors shall annually elect a general "manager who shall have ENTIRE *charge of the business* "*and* AFFAIRS of said company subject to the order and "approval of the Board of Directors" (R. p. 63).

No exception is made as to the company's being a *not going* concern. Nor is the power limited to the time *while it is a going cancern.* Chaffee was to have ENTIRE charge of the "AFFAIRS" as well as the business of the company.

In *Lewis* vs. *Hartford Silk Manf. Co.*, 56 Conn., 25, there had been a mortgage of its real estate made by the corporation to the plaintiffs to secure anvances not to exceed $100,000. They had made advances to $151,000, and ginghams had been given them by the manager for the rest. The question was whether they could hold the ginghams *in addition* to the mortgage.

The court said (p. 37), by Judge Pardee, the whole Court concurring in *the opinion* (p. 40):

"On or about July 9th, 1885, T. F. Plunkett, the presi- "dent and principal business and financial manager of the "Silk Manufacturing Company, requested the plaintiffs "to make advancements to the company in addition to "those contemplated and secured by mortgage, and verb- "ally agreed that these should be secured by the mort- "gage, by the ginghams previously and subsequently con- "signed to them, and by the Flat Top Coal Company's "stock pledged by Bartholomew. Requests for additional "advancements were renewed from time to time by Plun- "kett, and on some of the later occasions Bartholomew "was present. Upon such requests and agreement the

"plaintiffs, between July 9th, 1885, and September, 1886, "advanced the sum of $51,000 to the company. *There "was no vote either of its stockholders or directors au- "thorizing such borrowing or agreement. No such vote "was necessary to make the acts of Plunkett binding "upon the corporation.* Having made him its principal "and general financial manager and agent, with no limit- "ation upon his power, and having notified all persons "concerned of such appointment, the company is "bound by his act of borrowing for its "benefit, and of pledging ginghams or any other "personal property for repayment. He was "clothed with power to borrow money for its necessary "and proper uses from any person who would lend; to "sell ginghams, and repay; or consign ginghams with "leave to retain the proceeds; or use any other property "for that purpose. And as in these matters in legal con- "templation he was the corporation, he could bind it as "effectually as it could bind itself by corporate vote when "taking up money, by an agreement that payment should "be secured by the previous mortgage, provided (in the "interest of other creditors) the aggregate should not ex- "ceed the extreme limit of $100,000. *Of course, a corpo- "rate vote was necessary* to a valid mortgage by its finan- "cial agent *of the real estate* of the Silk Manufacturing "Company to the plaintiffs. *But all money or other "personal property or rights therein, coming into its "possession because of the mortgage security thus given, "were at the disposal of its general, unlimited financial "agent*, equally with any other personal property belong- "ing to it. A corporate vote is not made necessary to the "valid disposition of this right in personal property, be- "cause of the mention of it in a sealed instrument. "Therefore, if we should concede that, as against the plain- "tiffs, the agreement between them and the Silk Manufac-

" turing Company constituted a valuable right in the pos-
" session of the latter, *nevertheless Plunkett had absolute*
" *power of disposal of this right for its benefit. He could*
" *exchange, sell, pledge or annul it by his individual*
" *action, at his discretion.* Presumably the agreement
" by the mortgagor to deliver and by the mortagee to re-
" ceive ginghams in payment was for the benefit of the
" latter, and although it has a place in the condition of
" the mortgage, they were under no obligation to see in it
" any limitation upon the power of the mortgagor's general
" financial agent thereafter to borrow, if they should be
" willing to lend, other and additional sums for its benefit,
" and make payment therefor in money, ginghams, or any
" other personal property. The purpose of the mortgagor
" was to give satisfactory security for the loan of $100,000;
" not at all to bar itself from borrowing other money, if a
" willing lender could be found.

" *As it is the company's duty always to pay its debts,*
" *the application of any of its personal property or rights*
" *in stock* AT ANY TIME *to that use by its accredited finan-*
" *cial agent, without limitation, is binding upon it.*"

Although not discussed in the opinion, it appeared in the case that all the ginghams had been given for past due debt, as it did in *Sherman* vs. *Fitch*, 98 Mass. 59.

III.—*But the transfer* HAD *the authority of the directors.*

In *Railway Companies* v. *Keokuk Bridge Co.*, 131 U. S. 371, the Court, speaking by Mr. Justice Gray, sai

P. [illegible]—" When the president of a corporation
" executes, in its behalf, and within the scope of its
" charter, a contract which requires the concurrence
" of the board of directors, and the board, knowing
" that he has done so, does not dissent within a rea-
" sonable time, it will be presumed to have ratified

"his act. *Indianapolis Rolling Mill* v. *St. Louis*, "*&c., Railroad*, 120 U. S. 256."

In *Fitzgerald Construction Co.* v. *Fitzgerald*, 137 U. S. 98, the Court, speaking by Mr. Chief Justice Fuller, said:

P. 109—"These instructions were justified under "the evidence. If the moneys were used to pay off "indebtedness of the company arising in the con- "struction of the road, and for work done under "proper authority, the transactions were in pursu- "ance of the authorized purposes of the corporation, "and occurred in its legitimate business. The execu- "tion of the paper could not be held to be in excess "of the powers given, and it was clearly the duty of "the directors to give contrary instructions if they "wished to withdraw the general management from "the president; and to disaffirm the action of their "agents promptly and at once if they objected to it. "*Indianapolis Rolling Mill* v. *St. Louis, &c., Rail-* "*road*, 120 U. S. 256; *Cresswell* v. *Lanahan*, 101 "U. S. 347."

The case of

Indianapolis Rolling Mill v. *St. Louis, etc., R R.*, 120 U. S. 256,

was this: There was a contract by which defendant bought of plaintiff ten thousand tons of iron rails to be delivered between June and October. On the 4th of October drafts to the amount of $54,000, part payment for the iron delivered, were due, and the agent of defendant agreed to pay them, if the plaintiff would make a release for the balance of the contract. Such a release was signed "Indianapolis Rolling Mill Co., by J. Thomas, treasurer," 8 February. Thomas signed by the direction of one Jones, who was both president and superintendent. The by-laws declared (p. 283) that the superintendent "shall have

"charge of the works, property and operations of the "company, and shall employ all operatives and certify "all wages due and other expenses to the secretary, "* * * and shall, with the approval of the president, "buy and sell material and make all contracts for the "same, and for work," etc.

Another by-law declared that "the superintendent and "all other persons shall in all cases be subject to the "control of the board of directors in everything where the "board shall elect to exercise such control."

The trial court found "that after the return of Mr. "Thomas from the City of New York to Indianapolis, "some time in March, there was a meeting of the board "of directors of plaintiff, at which the validity of the "release executed by Mr. Thomas was discussed; but the "records do not show that at that particular meeting any "definite action was taken; that the directors at that "meeting did in fact agree to submit the question to "counsel of plaintiff, let him investigate it, and then "act upon his advice; that about two years after this meet- "ing, and a year and a half after this suit was commenced, "a *nunc pro tunc* entry was made upon the records of "plaintiff of the proceedings of plaintiff's board of direc- "tors, which showed a repudiation upon the part of the "board of directors of the release so executed, and that "this suit was originally instituted in this Court at the "first term thereof after the execution of the release."

"The Court, speaking by Mr. Justice Miller (p. 259):

"We concur with the Court below that on the facts "thus stated the release was a valid release. Its execu- "tion was of that class of business which, under the by- "laws of the corporation and the course of business "between these parties, had been confided to the presi- "dent and superintendent, both of which offices were "held by Mr. Jones. The direction given by Mr. Jones

"to the treasurer, Mr. Thomas, both of whom were also "directors in the corporation, was within the line of his "authority. He had under this same authority without "any express resolution or direction of the board of "directors, made the contract on which this suit is "brought; and it would seem that, not being under seal, "a simple contract concerning the ordinary business of "the company, the same power which enabled him to "make it was sufficient to enable him to release it, unless "the power had been withdrawn.

"Another principle leads to the same result. These "by-laws show that the board of directors retained the "power in their hands to control the president and super-"intendent in any transaction, whenever it was thought "proper to do so. This matter was reported to the "directors; they had a meeting upon the subject some "six weeks after the whole thing had been consummated, "and after they had received the benefit of the release by "the payment of their drafts. The rule of law upon the "subject of the disaffirmance or ratification of the acts of "an agent required that if they had the right to disaffirm "it they should do it promptly, and if after a reasonable "time they did not so disaffirm it, a ratification would be "presumed. In regard to this it appears that the board, "when notified of what had been done by their agents, "did not disaffirm their action at that time, but that the "act or resolution of disaffirmance was passed about two "years after notice of the transaction, and that if the suit "brought in this case can be considered as an act of dis-"affirmance, it came too late, as it was commenced some "*six months after they had knowledge of the release.*

"As was stated in the somewhat analogous case of the "*Twin Lick Oil Co.* vs. *Marbury*, 91 U. S., 592, 'the "'authorities to the point of the necessity of the exercise "'of the right of rescinding or avoiding a contract or "'transaction as soon as it may be reasonably done, after

" 'the party, with whom that right is optional, is aware
" 'of the facts which gave him that option, are numerous.
" '* * * The more important are as follows: *Badger* vs.
" '*Badger*, 2 Wall., 87; *Harwood* vs. *R.R. Co.*, 17 *id.*, 78;
" '*Marsh* vs. *Whitmore*, 21 *id.*, 178; *Vigers* vs. *Pike*, 8 Cl.
" '& Fin., 650; *Wentworth* vs. *Lloyd*, 32 Beav., 467; *Fol-*
" '*lansbee* vs. *Kilbreth*, 17 Ill., 522; S. C., 65 Am. Dec.,
" '691.' See also *Gold Mining Co.* vs. *National Bank*,
" 96 U. S., 640; *Law* vs. *Cross*, 1 Black, 533.

And the same is the law of Connecticut.

In

Lewis vs. *Hartford Silk Manf. Co.*, 56 Conn., 25,

already quoted, the court said, p. 39: " Moreover, upon
" the record there was such corporate ratification of
" Plunkett's acts as would have established them in
" the absence of any previous authority. On June 30th,
" 1885, the plaintiffs had advanced to the Silk Manu-
" facturing Company the full sum of $100,000, for security
" of which the mortgage was given, and by mistake
" $6,000 in excess. On January 1st, 1886, they gave the
" company written notice that they had advanced ad-
" ditional sums to it and had applied towards the pay-
" ment therefor the proceeds of the ginghams which it
" had consigned to them, and which were referred to in
" the condition of the mortgage. The company received
" this notice and made on its own books a like credit upon
" a like account. Silence then imposes silence now upon
" it in reference to this transaction. The result is an
" actual application of the proceeds of the ginghams by
" the plaintiffs to the repayment of the last advances with
" the knowledge and assent of the Silk Manufacturing
" Company."

And of New York, where the bills of sale were given.

In

Jourdan vs. *L. I. R.R. Co.*, 115 N. Y., 380.

By the terms of an alleged contract between two railroad corporations each gave to the other the right to use its tracks and depots, and agreed to run its trains over the tracks of the other, the earnings of the two roads to be divided in certain proportions. In an action against one of the corporations to recover damages for breach of the contract, it appeared that it was executed in the name of defendant by its president and secretary, who were also directors, and it was sealed with its corporate seal. Defendant's secretary testified that the contract was drafted in pursuance of negotiations between the parties, and the draft was in his office. It was executed with the intention of getting a ratification by the board of directors, but this was not done. The contract was acted upon for a year.

The Court of Appeals in holding the contract to be binding, and that there was not even any question for the jury, said, by Judge Danforth (p. 385): "If they intended to disavow it, it was their duty to be active in "so doing and not remain willfully passive, in order to "profit by an omission or mistake on the part of their "own officers, and which they might have prevented.

The above is the general and well-settled doctrine,

But

it is equally well settled that the rule is the same where the transaction is made known to the directors INDIVIDUALLY *and not at a meeting.*

In *Creswell* v. *Lanahan*, 101 U. S. 437, the Court, speaking by Mr. Justice Swaye, said:

> P. 352—"The transaction, like all others, *was* "*made known to the trustees individually*, and they "never objected. This intelligent acquiescence was "a binding ratification. *Kelsey* v. *National Bank* "*of Crawford County*, 69 Pa. St. 426; *Hilliard* v.

" *Goold*, 34 N. H. 230; *Christian University* v. *Jor-
" *dan*, 29 Mo. 68; *Sherman* v. *Fitch*, 98 Mass. 59.

" The arrangement was first challenged after the
" company became bankrupt and went into the hands
" of appellants.

" The company was concluded and the appellants
" can be in no better position."

And the cases cited fully bear out the proposition.

Kelsey v. *The Nat. Bk. of Crawford County*, 69 Pa. St. 426:

(Headnote)—" Upon the discovery of the robbery of a
" bank, a minority of the directors and the cashier met
" with a detective in the bank; the cashier with the
" advice of those directors offered a reward for the money
" and the thief, and sent to different places telegrams
" containing the offer; all the directors lived in the same
" place; they did not disavow the cashier's act; the de-
" tective arrested the thief and obtained the money.
" *Held* to be evidence of ratification by the bank."

And the court, speaking by Williams, *J.*, said:

(p. 430.) " Nor was it necessary, in order to bind the
" bank by their acquiescence, that notice should have
" been given to the directors, when sitting in their official
" capacity as a board. If they were personally cog-
" nizant of the offer made by the cashier, it was their
" duty to call a meeting of the board and disavow the act,
" if they were unwilling that the bank should be bound
" by it."

Sherman v. *Fitch*, 98 Mass. 59:

The president of the Northampton Sugar Refining Company mortgaged in the name of the company all the machinery in its sugar house and its " Refinery " to Fitch to secure a precedent debt of eighteen thousand dollars,

which the company owed Fitch. This was known to all the directors but one, "and was approved by them, pro- "vided their neglect to make any objection to the same "can be construed as an approval."

The court speaking by Wells, *J.*, said:

(p. 64.) "The remaining consideration relates to the "authority of Sampson to execute the mortgage in behalf "of the corporation. It is not necessary that the au- "thority should be given by a formal vote. Such an act "by the president and general manager of the business "of the corporation, with the knowledge and concurrence "of the directors, or with their subsequent and long- "continued acquiescence, may properly be regarded as the "act of the corporation. Authority in the agent of a "corporation may be inferred from the conduct of its "officers, or from their knowledge and neglect to make "objection, as well as in the case of individuals. *Em-* "*mons* v. *Providence Hat Manufacturing Co.*, 12 Mass. "237; *Nelledge* v. *Boston Iron Co.*, 5 Cush. 158; *Lester* v. "*Webb*, 1 Allen, 34. The absence of one of the directors "in Europe could not deprive the corporation of the "capacity to act and bind itself by the act of the officers "in active charge of its affairs."

Hilliard v. *Goold*, 34 N. H. 230:

Statute required rates of fare to be established by "every railroad *corporation*."

Rates in this case were established by the president. There was no proof of any action by the directors, either way.

Christian University v. *Jordan*, 29 Mo. 68.

A statute of Missouri provided that anybody receiving and paying out bank notes of less denomination than five dollars could not recover on contracts. The Christian University sued Jordan on a contract. Jordan pleaded in bar

that it had received and paid out bank notes of less than five dollars—and proved that one Hatch, the treasurer of the University had done so. It was proved that there was no direction "upon the part of said corporation" to Hatch, "as to what kind of money he should receive or "pay out."

Held that it could not recover.

The facts of this case bring it clearly within the above rule. Such of the opinions, in regard to these silks, as have discussed this question, where they have alluded to the matter of ratification at all, have dismissed it with a remark like that of the court below—"There was no sub-"sequent ratification, for when the directors were called "together for that purpose they declined to ratify" (R. p. 713).

We submit that this is a misapprehension. We say that they did *not* decline to ratify. *They declined to act as directors at all*—but expressed no word of disapproval.

The facts are as follows: There were five directors.

Chaffee.
Fenton.
Sumner.
Wilson.
Fowler.

Chaffee made the bill of sale. That disposes of him.

Before the seventeenth of April Chaffee made his agreement with the bank by which he was to turn over this particular silk. He told Fenton of it the same day. *Fenton does not deny this*, (*ante* p. 25); and he expressly swears that he has never made the slightest objection or question or expressed the least dissatisfaction about it. That disposes of *Fenton*.

Sumner was out of town.

Chaffee on the twenty-second of April wrote to Sumner

telling him what he was going to do. Sumner has never objected. That disposes of *Sumner*.

Here is a majority of the board. *Fowler* acted with Chaffee all through, beginning with the making of the first agreement. But as Fowler was also a director of the bank, perhaps he does not count. But he certainly cannot count in any way *against* us—not even to make up the total number. There remains *Wilson*. Chaffee transferred the silk on the 23d.

On the 26th the receiver was appointed.

On the 27th Chaffee returned and that day told Fenton what he had done. This Fenton swears to himself—and he did not object.

The 28th was a Sunday.

On the 29th Chaffee, Fowler Fenton and Wilson met—Chaffee told what he done and asked them to ratify. Fenton and Wilson *declined to act as directors* and there was no meeting. If they had expressed any objection—if they had even declined in words to ratify—the case would be widely different, *but they did not—and so long as they did not resign and thus permit Chaffee to fill their places, they by their silence, ratified.*

The cases are express that there must be affirmative action of disapproval.

In *Indianapolis Rolling Mill* v. *St. Louis, &c., Railroad, 120 U. S. 256*, the board "had a meeting *upon the subject*" (p. 259) and because they took no action on the subject, either way, the court held that they had ratified the contract made by the manager.

The proofs as to this matter were taken *ten months* afterward. Fenton, Sumner and Wilson *had never resigned, were still directors and had never objected.* Of course they are, on the proofs, still directors.

And it is perfectly plain, upon their own testimony, *that if they had acted,* THEY WOULD HAVE RATIFIED.

IV.—*The fact of the appointment of the receiver had no effect upon Fenton and Wilson in the way of their being directors, and gave them no excuse for acting as they did: that is, declining to act as directors at all.*

Of course the appointment of the receiver affected only the property of the company which was in Connecticut, and without a dissolution of the company or an injunction enjoining the directors from acting, their duties as well as their powers as directors continued.

The common law and the special statutes of Connecticut applicable to this matter were as follows:

In *Smith* vs. *Skeary*, 47 Conn., 47: "A corporation "transferred a quantity of its goods to two of its direc- "tors, to be sold by them and the proceeds applied in "payment of a joint claim of large amount which they "had against it. The corporation was in fact insolvent" (p. 47). Proceedings in insolvency were not begun within sixty days.

The court said (p. 54), by Judge Carpenter, the whole court concurring:

"We are unable to discover any principle of law which "renders the transaction fraudulent. *The corporation had "a right, and it was its duty, to pay this debt. These "creditors had a perfect right to receive pay in money or "goods*, and the fact that they were stockholders and "directors did not modify or abridge that right, so long "as there was no actual fraudulent intent. *The fact, if "it be a fact, that it operated to prefer these creditors, is "not sufficient at common law to stamp it as fraudulent, "for the common law favored the vigilant, and a credi- "tor might lawfully obtain a preference.* It does not "become fraudulent under our insolvent laws, because no "proceedings in insolvency were instituted in due time, "so that the case cannot be brought within the operation "of those laws. *The consideration was good and*

"*adequate*, so that there is no badge of fraud in that re-
"spect."

Section 501 of the General Statutes of Connecticut was and is as follows:

"Sec. 501. All transfers of property by any person in "failing circumstances, with a view to insolvency, shall "be void, unless made by a written assignment for the "benefit of all creditors in proportion to their respective "claims, embracing all the property of the assignor, "except such as is exempt from execution, real estate "situated out of this State, and, in case of sole assignors, "one hundred dollars in cash, and lodged for record in "the office of the Court of Probate having jurisdiction."

"Sec. 504. No transfer of property otherwise valid shall "be made void by any provision of this chapter, unless "within sixty days after such transfer proceedings shall "be instituted for the purpose of carrying the estate of "the party making such transfer into settlement as an "insolvent estate,——

Sections 501 and 504 are parts of Chapter LII. and Title 13 of the General Statutes.

Title 13 is entitled "Courts of Probate; Their Powers "and Jurisdiction," and consists of fourteen chapters—XLII. to LV., inclusive—and two hundred and nineteen sections—430 to 648, inclusive.

Chapter XLII. is entitled "General Provisions." It consists of sixteen sections—430 to 445, inclusive—and provides for the organization and powers of the Courts of Probate; the election of the judges of those courts and such matters.

Chapter LII. is entitled "Insolvent Debtors" and consists of thirty-five sections—501 to 535, inclusive.

Sec. 501 is the section above quoted—"All transfers of "property by any person in failing circumstances with a "view to insolvency, shall be void unless," &c.

Secs. 501 and 502 provide for the "lodging" by the "assigning debtor" of an assignment for all his creditors in the "office of the Court of Probate," and expressly and in terms applies to corporations.

Sec. 504 is the section already quoted, which provides that "no transfer of property otherwise "valid shall be "made void by any provision of this chapter, unless "within sixty days after such transfer proceedings shall "be instituted for the purpose of carrying the estate of "the party making such transfer into settlement as an "insolvent estate."

Sec. 507 provides for compulsory proceedings in insolvency by petition by a creditor to the Court of Probate, in which proceeding the Court of Probate appoints a trustee.

Sec. 511. The Court of Probate to appoint a trustee under the voluntary assignment made according to Section 501.

Sec. 523. Commencement of proceedings in insolvency dissolves all attachments and all levies of executions made within sixty days next preceding

Sections 511–533 relate to the powers of above "trus- "tees" and the settlement of the insolvent estate by them; and particularly mention (Sec. 519) "trustees in insolvency "of the estate of corporations."

Section 524 is as follows:

Page 132: "SEC. 534. *All proceedings for the settle- "ment of the estate of insolvent debtors shall be had "in the Court of Probate of the district* in which such "debtor or one of such debtors resides, *except that in the "case of copartnerships and corporations* all such pro- "ceedings shall be had in the Court of Probate of the dis- "trict within which such copartnership or corporation had "its office or principal place of business. In case of a "non-resident debtor owning property within this State,

"the proceedings shall be had in the district in which "such property, or any part of it, may be found situated. "*The date of the commencement of proceedings in insol-* "*vency shall be deemed to be that of the lodgment of the* "*assignment for record, or of the filing the petition for* "*the appointment of a trustee.*"

The foregoing are the statutory provisions in regard to proceedings in insolvency.

The following is the statutory provision for receivers of this sort of corporation:

TITLE XXX.

PRIVATE CORPORATIONS.

CHAPTER CXIX.

"SEC. 1942. The Superior Court in the county in "which any corporation, organized under the laws of this "State, has its principal place of business, may, as a "court of equity, on the application of any of its stock- "holders, wind up its affairs and dissolve it, *if said* "*Court shall find that said corporation has voted to* "*wind up its affairs, or abandoned the business for* "*which it was organized, and has thereafter neglected* "*within a reasonable time or in a proper manner to* "*wind up its affairs and distribute its effects among* "*its stockholders;* and for this purpose may, if it deem "it necessary, appoint one or more receivers of the estate "of said corporation, and limit a time for its creditors to "present their claims to such receivers, and direct public "notice thereof to be given; and all claims not presented "within such time shall be barred. Said receivers shall "allow all just claims against said corporation, collect its "debts, sell its property, and convert the same into "money, and report their doings to said court as it may "direct. Said court may, on complaint of any person "aggrieved by such doings, grant such relief as the nature

"of the case may require; and it may make such orders "as to the doings of the receivers, their compensation, "and other expenses, and as to the payment of debts and "distribution of the effects of said corporation, as may be "just and conformable to law."

There are special statutes in regard to Insurance Companies, banks' and railroads, but the above is the only one which applies to this sort of corporation.

Insolvency is therefore not one of the grounds for the appointment of a receiver of a corporation by the Superior Court.

All insolvency proceedings must be in the Court of Probate.

I am informed that, in practice, if it is made to appear to the Superior Court after it has appointed a receiver that the corporation is in fact insolvent, the Court will permit a petition in insolvency to be filed in the Court of Probate; and that this has been frequently done on the suggestion of the Court itself, when it had been ascertained that the corporation was insolvent.

It thus appears that the whole subject of insolvency and the settlement of insolvent estates is left exclusively to the various Courts of Probate.

This further appears from a comparison of Chapter 69 of the Laws of 1895, with Section 523 of the General Statutes already referred to.

They are as follows:

"SEC. 523. The commencement of "proceedings in insolvency shall "dissolve all attachments and all "levies of executions not com- "pleted, made within sixty days "next preceding, on the property "of the insolvent debtor; but if "the property is subsequently taken "from the trustee, so that it cannot "be used for the benefit of the

PUBLIC ACTS CONN., 1895.

"CHAPTER XCVI.

"AN ACT concerning Receivers of "Corporations and Copartner "ships:

"The commencement of proceed- "ings for the appointment of a re- "ceiver of a corporation or a co- "partnership shall dissolve all

"creditors of the estate, or if the "trust shall be terminated by order "of the Court, said attachments and "levies of execution shall revive, "and the time from the commence- "ment of proceedings in insolvency "to the time when the trustee shall "be dispossessed of the property, or "when such trust shall be termi- "nated, shall be excluded from the "computation in determining the "continuance of the lien created by "such attachment; but the attach- "ing and levying creditors shall be "allowed the amount of their legal "costs, accruing before the time of "the appointment of a trustee, "which shall be paid as hereinafter "provided, and in the order of such "attachments and levies, if their "respective claims shall, in whole "or in part, be allowed by the com- "missioners."

"attachments and all levies of "executions, not completed, made "within sixty days next preceding, "on the property of such corpora- "tion or copartnership; but if the "property is subsequently taken "from the receiver, so that it can- "not be used for the benefit of the "creditors of said corporation or "said copartners, nor made subject "to the orders of the court in the "settlement of the affairs of said "corporation or copartnership, or if "the receivership shall be termi- "nated by order of the court, pend- "ing the settlement of the affairs of "the corporation or copartnership, "said attachments and levies of "execution shall revive, and the "time from the commencement of "such proceedings to the time when "the receiver shall be dispossessed "of the property, or the finding of "the court that said property is not "subject to the orders of said court, "or when said trust shall be termi- "nated, shall be excluded from the "computation in determining the "continuance of the lien created by "such attachment; but the attach- "ing or levying creditors shall be "allowed the amount of their legal "costs, accruing before the ap- "pointment of a receiver, as a pre- "ferred claim against the estate of "said corporation or copartnership, "if their respective claims upon "which the attachments are found- "ed shall in whole or in part be "allowed.

"Approved: April 25, 1895."

Receivers of dissolved copartnerships are provided for by Sections 1313 and following General Statutes.

It is quite apparent that the framers of this act of 1895 considered a receivership *not* a proceeding for the settlement of an insolvent estate.

The complainants, and any other creditor, could have avoided the transfer by beginning proceedings in insolvency, in due time, in the Court of Probate.

No one, however, did so, and it follows that the transfer is saved by Section 504.*

II.

Mr. Pangburn's judgment is good.

1.—*The assignment.*

The sale of the notes by Mr. Dooley to Mr. Pangburn, *having been a judicial sale*, made by order of the Circuit Court of the United States, with the approval of the comptroller of the currency, and confirmed by that court, there is an estoppel by record as well as by deed. Mr. Dooley's lips are forever closed from questioning that the whole title passed by the sale.

The order, *i. e.*, the order authorizing the sale and the order confirming it, were made in a proceeding to which all parties in interest were parties, and as all possible parties in interest—that is, Mr. Dooley, his creditors and the Comptroller of the Currency—are unanimous in its support, it is submitted that the sale must stand. Certainly the complainants cannot attack it.

They cannot raise any question, and in particular they cannot raise the question of the adequacy of the consideration.

Stevens vs. *Hauser*, 39 N. Y., 302, was an action of ejectment turning upon the validity of a bankrupt sale under the Act of 1842.

The papers in regard to this sale by the District Court of the United States were as follows:

19 June, 1861—Official or general assignee reports, "that an application has been made to him to pro- "cure all the interest which the said bankrupt had, "and which became vested in the assignee by the "decree aforesaid, of, in, and to the following "described premises, to wit:"

(Description follows:—two lots, 46th Street New York.)

"And the assignee aforesaid, having carefully ex- "amined the subject-matter thereof, now moves the "Court for an order as follows, to wit:

"Ordered, That the official or general assignee be "authorized to sell and dispose of the property "herein referred to, at private sale, pursuant to the rules and practices of this Court."

Whereupon, on the 19th June, the District Court made an order in the following words:

"On motion of the official or general assignee in "bankruptcy, and filing his report: Ordered, that he "convey the interests of the bankrupt in certain lots "of land, situate in the City, County and State of "New York, according to the description of said land "contained in said report."

Whereupon the official or general assignee made a deed of two lots to the plaintiff, reciting the consideration of one dollar.

Ct. App. Cases—Bar Ass'n, 1868, Vol. 12, pp. 16, 18.

The Court of Appeals held (*Stevens* vs. *Hauser*, 39

N. Y., 302, 305), by Judge Woodruff: "Whether "the assignee duly executed his trust in selling the "property for a nominal consideration might be an "interesting question, *if creditors of the bankrupt "had, in due season, called it in question, but the "defendant has nothing to do with that inquiry.*"

The fact of the assignment.

One of the grounds on which the assignment was attacked below—namely, the claim that Mr. Pangburn had agreed to return the proceeds recovered by him to Mr. Dooley—is *completely* disproved. Not even the three lawyers, when they had had him all alone, could induce him to do otherwise than deny this explicitly.

It remains to consider—

1. Whether the fact, which may be assumed, that the assignment was made with the wish that Mr. Pangburn would bring the suit, is of any consequence; and,

2. Secondly, whether the statements contained in Mr. Pangburn's deposition, and which on the stand he denied, already quoted, as to his doing it because he was told that it was desired to bring a suit in his name, have any effect upon the validity of the assignment.

In *Sheridan* vs. *The Mayor*, 68 N. Y., 30, the case was this:

One Jones had a claim against the City of New York, amounting to about $7,000. The City of New York sued Jones for *three hundred and fifty thousand dollars.* Jones assigned his seven thousand dollar claim to Sheridan, who was a workman in his employ, by a written assignment which was expressed to be "for one dollar and "other valuable considerations." Upon the trial the city proved pretty clearly that there had been no consideration for the assignment, and that it had been made solely to

defeat the city's setting off its large claim. The trial court left it to the jury to find whether the assignment was a "sham transaction," and the jury found a verdict *for the defendant*. The Court of Appeals said (p. 31):

Sheridan *vs.* Mayor, etc., 68 N. Y., 31.

"CHURCH, Ch. J.: The only question submitted to the "jury was whether the plaintiff was the real party in in- "terest. A written assignment, properly executed and "acknowledged before a proper officer, was produced, in "terms transferring absolutely for a valuable considera- "tion the demand in suit from Morgan Jones to the plain- "tiff, and proof was made of the delivery thereof by the "former to the latter. As to these facts there was no dis- "pute, nor could there be any dispute that the plaintiff "held the legal title to the demand. The learned Judge "submitted the question to the jury in this language: 'If "you believe from the evidence that the real party in in- "terest in this suit is Morgan Jones and that this is a "sham transaction, then I think the plaintiff should be "defeated in the action.'

"Precisely what the learned Judge meant by a sham "transaction, as applied to the transfer of the demand, "is not very apparent, but I infer from this and other "parts of his charge that he intended to charge, that "although a legal title to the claim was transferred to the "plaintiff and the assignment was valid as against the "assignor, *yet if the jury believed that the transaction "was colorable, that is, that by any private or implied "understanding the transfer was not intended as bona "fide, or an actual and real sale of the demand as be- "tween the parties, the plaintiff could not recover.* In "this, with great respect, I think the learned Judge "erred. A plaintiff is the real party in interest under "the Code, if he has a valid transfer as against the

" assignor, and holds the legal title to the demand. The " defendant has no legal interest to inquire further. A " payment to, or recovery by, an assignee occupying this " position, is a protection to the defendant against any " claim that can be made by the assignor. In this case, " from the undisputed facts, the defendant would be pro- " tected if it paid to the assignee, or if a recovery was " had against it by him. No question was made and none " submitted to the jury as to the execution or delivery of " the assignment, *and conceding that the circumstances* " *were such as to justify the jury in finding that it was* " *colorable between the parties, yet that would constitute* " *no defense on the ground that the plaintiff was not the* " *real party in interest.* Such inquiry might become " material if the rights of creditors were involved, or upon " ths right of interposing some defense or counter-claim " against the assignor. *Nor is it of any moment that no* " *consideration was paid for the demand by the assignee.* " *The assignor could give the demand to the plaintiff, or* " *sell it to him for an inadequate consideration, or with-* " *out any consideration. It is enough if the plaintiff has* " *the legal title to the demand*, and the defendant would " be protected in a payment or recovery by the assignee. " It is not a case of *mala fide* possession which the de- " fendant can avail itself of, as if a thief should bring an " action upon a promissory note which he had stolen. " These views are well settled by authority (44 N. Y., " 231; 61 *id.*, 614; 27 Barb., 178; 38 *id.*, 570; 29 N. Y., " 554; 15 Wend.. 640).

" As before remarked, there was no question as to the " making and delivery of the assignment, and the remarks " of the learned Judges at General Term, therefore, as to " when and under what circumstances a jury is or is not " justified in finding contrary to the evidence of one or " more witnesses, has no application to the question in-

"volved in this case, viz.: the *bona fides* as between "assignor and assignee of the transfer. *Suppose after "the trial of this action the assignor had commenced an "action. The defendant, by proving the making and "delivery of the assignment to the plaintiff, could have "defeated the action on the ground that he was not the "party in interest, and I apprehend he would not have "been permitted to show that the transfer was not as be-"tween them an actual bona fide sale*, and the result "might be that, although the defendant justly owed the "debt, it would avoid liability because no one had a right "to prosecute. The Code never anticipated such a "result."

As has been already said, it is to be supposed that the transfer was made by Mr. Dooley for the *purpose* of putting the notes in the hands of somebody who could sue upon them. It does not follow, however, that Mr. Pangburn had any such intention, or was otherwise moved to purchase than by a desire to make money. Nor is there any such proof. But let it be assumed that he did know all about it and made his purchase for that very purpose.

That the statute law of New York was so framed *with the express intention not only of permitting, but of sanctioning such a transaction*, is settled by an enormous mass of authority.

Before 1830, jurisdiction over a foreign corporation could be obtained by the Supreme Court of New York only by the consent of the corporation.

Matter of McQueen, 16 J. R., 5.
Gibbs *vs.* Queens Ins. Co., 63 N. Y., 114, 116.
Atlantic, &c., Tel. Co., *vs.* Baltimore, &c., R.R. Co., 14 J. & Sp., 377, 402.

By the *consent* of a foreign corporation jurisdiction could always be obtained in cases where the Supreme

Court of New York had jurisdiction of the subject matter of the action.

McCormick *vs.* Penn. Cent. R.R. Co., 49 N. Y., 303.

Gibbs *vs.* Queen Ins. Co., 63 N. Y., 114.

Matter of McQueen, 16 J. R., 5.

As the Supreme Court of New York has jurisdiction of everything in the world except as to the few matters where exclusive jurisdiction has been granted to the Federal Government, it follows that the consent of a foreign corporation would confer jurisdiction in every case except such as were solely about those few matters.

The appearance by an attorney was always, in New York, sufficient consent.

McCormick *vs.* Penn. Cent. R.R. Co., 49 N. Y., 303, 309.

And so long as the plaintiff had capacity to sue, it made no difference who he was nor where he resided, nor where the "cause of action" or the "subject of the action" arose.

McCormick *vs.* Penn. Cent. R.R. Co., 49 N. Y., 303, 309.

Upon the report of the revisers that the fair protection of the citizens of New York required that some provisions should be made to render such corporations amenable to the laws of New York in her own courts, sections 15 to 30 inclusive, of Article 1, Title 4, Chapter 8, Part 3 of the Revised Statutes (2 R. S., 459), were enacted.

These sections authorized proceedings—by attachment, only (Lawrence *vs.* N. J. R.R. & Tr. Co., 1 How. Pr., 250, —against foreign corporations "by a resident of this

State." The text of Section 15 was as follows: "§ 15. "Suits brought in the Supreme Court *by a resident of this* "*State*, against any corporation created by or under the "laws of any other State, government or country, for the "recovery of any debt or damages, may be commenced by "attachment."

The report of the revisers above meant was as follows:

"(In 16 J. Rep., p. 5, it was decided that an attach- "ment does not lie against a foreign corporation, "under the absent debtor act, and it has been re- "cently decided in the Court of Chancery, and af- "firmed on appeal, that that Court has no jurisdiction "to attach the property of such a corporation. These "bodies are becoming very numerous, and are carry- "ing on an extensive business in this State. The fair "protection of our own citizens requires that some "provision should be made to render such corpor- "ations amenable to our laws, and in our own courts. "The preceding sections have therefore been drawn in "analogy to the provisions in Chapter V, Title 1, of "the Second Part, R. S., against absent debtors. The "variations introduced are in favor of the corpor- "ations: 1st, in requiring security for costs; and 2d, "in providing for the publication of a notice, before "the attachment can issue. It is questionable whether "the latter provision should not be so modified as to "authorize the issuing an attachment at once.)"

5 Reviser's Reports, Part III, Chapter VIII, p. 28.

By Chapter 107 of the Laws of 1849 (p. 142), passed 15th of March, 1849, this section was amended so as to read as follows: "§ 15. Suits may be brought (in the "Supreme Court, in the Superior Court of the City of "New York, in the Court of Common Pleas in and for "the City and County of New York), against any cor-

"poration, created by or under the laws of any other "state, government or country, for the recovery of any "debt or damages, whether liquidated or not, arising "upon contract made, executed or delivered, within this "State, or upon any cause of action arising therein; such "suits may be commenced by complaint and summons "together with an attachment, as now provided by law, "and such complaint and summons may be served as pro- "vided by sections one hundred and thirteen and one "hundred and fourteen of the Code of Procedure."

Section 113 of the then Code of Procedure was as follows:

"§ 113. The summons shall be served by delivering a copy thereof, as follows:

"1. If the suit be against a corporation, to the presi- "dent, or other head of the corporation, secretary, cashier, "or managing agent thereof":

The rest of the section related to parties other than corporations.

Section 114 provided for service of the summons by publication when the *person on whom the service was to be made* could not be found within the State, a cause of action existed against the defendant, and the defendant had property in the State.

On the eleventh of April, 1849, the Legislature of New York enacted Chapter 438 of the Laws of that year—amending the Code of Procedure.

By that amendment Section 427 was added (Chapter 438, Laws 1859, pp. 613, 697), and was as follows:

"§ 427. An action against a corporation created by, or "under the laws of any other State government, or "country, may be brought in the Supreme Court, the "Superior Court of the City of New York, or the Court "of Common Pleas for the City and County of New "York, in the following cases:

"1. By a resident of this State, for any cause of "action.

"2. By a plaintiff not a resident of this State, when "the cause of action shall have arisen, or the subject of "the action shall be situated within the State."

The above sections, 113 and 114, were repealed.

Section 134, as then enacted, read as follows:

"§ 134. The summons shall be served by delivering a "copy thereof, as follows:

"1. If the suit be against a corporation, to the presi- "dent or other head of the corporation, secretary, cashier, "or managing agent thereof."

The rest of section relates to persons other than corporations, the details of service, and when defense may be made.

Section 135, as thus enacted, read as follows:

"§ 135. Where the person on whom the service is to "be made, cannot, after due diligence, be found within "the State, and that fact shall appear by affidavit to the "satisfaction of a court or a judge thereof, or a county "judge, and it shall in like manner appear that a cause "of action exists against the defendant, in respect to "whom the service is to be made, or that he is a necessary "or proper party to an action, relating to real property in "this State, such court or judge may grant an order "that the service be made, by the publication of a sum- "mons, in either of the following cases:

"1. Where the defendant is a foreign corporation."

The rest of the section relates to persons other than corporations, the details of the service, and when defense may be made.

In this condition of the statutes the Supreme Court of New York held that no jurisdiction *over the person* of a foreign corporation could be got, except by the voluntary

apperance of the corporation. That the provision for personal service in Section 134 of the Code did not apply to a foreign corporation at all, and that the provision for service by publication in Section 135 applied to foreign corporations only where specific property had been, or was to be, seized by attachment in the same action.

Hulbert *vs.* The Hope Mutual Ins. Co., 4 How. Pr., 275 (January, 1850).

Affirmed, the opinion being adopted as the opinion of the court, 4 How. Pr., 415 (April, 1850).

In other words the court held, as before, that a suit against a foreign corporation, other than by its consent, could only be as to property in the State.

The Legislature thereupon (tenth July, 1851), amended those two sections of the Code so that they read as follows:

"§ 134. The summons shall be served by delivering a "copy thereof as follows:

"1. If the suit be against a corporation, to the president "or other head of the corporation, secretary, cashier, "treasurer, director or managing agent thereof; *but such "service can be made in respect to a foreign corporation "only, when it has property within this State, or the "cause of action arose therein.*"

"§ 135. Where the person, on whom the service of the "summons is to be made, cannot, after due diligence, be "found within the State, and that fact appears by affidavit "to the satisfaction of the court or a judge thereof, or of "the county judge of the county where the trial is to be "had, and it in like manner appears that a cause of action "exists against the defendant, in respect to whom the "service is to be made, or that he is a proper party to an "action relating to real property in this State, such court "or judge may grant an order that the service be made by

"the publication of a summons in either of the following "cases.

"1. Where the defendant is a foreign corporation, *has "property within the State, or the cause of action arose "therein.*"

On the tenth of April, 1855, the Legislature of New York enacted the following (Chapter 279, p. 470):

"§ 1. Every insurance and other corporation created by "the laws of any other State, doing business in this State, "shall, within thirty days after the passage of this act, "designate some person residing in each county where "such corporation transacts business, on whom process "issued by authority of or under any law of this State "may be served, and within the time aforesaid shall file "such designation in the office of the Secretary of State; "and a copy of such designation, duly certified by said "officer, shall be evidence of such appointment; and it "shall be lawful to serve on such person so designated, "any process issued as aforesaid; such service shall be "made on such person in such manner as shall be pre-"scribed in case of service required to be made on any "resident of this State, and such service shall be deemed "a valid service thereof.

"§ 2. In all cases where such designation shall not be "made as aforesaid, and such foreign corporation cannot "be served with such process according to the present "provisions of law, it shall be lawful to serve such pro-"cess on any person who shall be found within this State "acting as the agent of said corporation, or doing busi-"ness for them.

"§ 3. Service made in accordance with any provision of "this act shall be as effective as if made in the form and "manner required by law, and shall be deemed a full "compliance with any statute requiring personal or other "service to be made."

The effect of these last changes in the laws was to give a personal action against a foreign corporation, against the latter's will, in cases where "the cause of action 'arose' in New York"; whereas before, as has been shown, no personal action could be maintained against a foreign corporation except by its own consent; and the court held—

First.—That unless the cause of action arose in New York a suit against a foreign corporation—unless, of course, by its consent—could only be *in rem*, as to attached property. Bates *vs.* N. O., J. & Great N. R.R. Co., 4 Abb. Pr., 72; 13 How. Pr. (summons served 9th August, 1855; motion heard at General Term September, 1856, and decided December, 1856); McBride *vs.* Farmers' Bank, 26 N. Y., 450, 455, 457.

Secondly.—That service upon an officer, temporarily in the State, of a foreign corporation was valid only when the foreign corporation had property in the State, or the cause of action arose in it.

Hiller *vs.* B. & M. R.R. Co., 70 N. Y., 223.

And *Thirdly.*—That the designation by a foreign corporation in pursuance of the above law of 1855, of a person upon whom process might be served, *was a consent to the jurisdiction.*

Gibbs *vs.* Queen Ins. Co., 63 N. Y., 114, 128.
Pringle *vs.* Woodworth, 90 N. Y., 502, 509.
Teel *vs.* Yost, 128 N. Y., 387, 397.

The laws being in this condition, one McBride brought an action in the Supreme Court of New York against the Farmers' Bank, an Ohio corporation. The action was begun on the thirtieth July, 1855. The complaint set out a money demand, due from the defendant to the Farmers'

and Mechanics' Bank of Hartford, Conn., and an assignment by the latter corporation to McBride.

The answer denied the assignment, and alleged as follows:

"And the said defendants aver, upon their information "and belief, that the said alleged assignment is and was "*merely colorable* and a fraud upon the statutes and laws "of the State of New York, in relation to suits by one "foreign corporation against another foreign corporation, "and that the real party in interest as plaintiff in this "action is the said Farmers' and Mechanics' Bank, and "that neither said last-named bank, nor the plaintiff, is "entitled or authorized to prosecute the said defendants, "for or in relation to said claim in this Court or in the "Courts of this State."

Ct. Appeals cases, State Lib., vol. 128—case 5.

Upon the trial the plaintiff read in evidence a paper purporting to be an assignment of the claim by the Farmers' and Mechanics' Bank to McBride, signed "C. Boswell, Prest.; John C. Tracy, cashier," with the seal of the bank affixed, but neither witnessed nor acknowledged and with no further proof.

The trial court directed a verdict for the plaintiff. Ct. Appeals Cases, State Lib., Vol. 128—case 5, pp. 2, 3, 6, 8, 33.

Judgment having been entered and an appeal taken by the defendant to the Court of Appeals, that court said (*McBride* vs. *Farmers' Bank*, 26 N. Y., 450):

By Judge Selden, page 457:

"Nor is there any doubt that the bank had a right to "assign the demand. A chose in action against a foreign "corporation is not rendered unassignable by any pro-"vision of the statutes of this State. Probably an action "against a foreign corporation could not properly be

"brought in our courts by a non-resident of the State, "unless the cause of action arose or the subject of the "action were situated within the State (Code, Sec. 427; "4 Abb., 72; S. C., 13 How., 316). The inability to "maintain an action does not, however, create an inability "to assign the demand either to a resident or non-resident "of this State, and such assignment in either case would "transfer the entire cause of action. In the former case "the assignee could maintain an action in our courts "on the demand; in the latter he could not. It is in- "sisted, on the part of the appellant, that 'the plaintiff, "being the assignee of a foreign corporation, can stand in "no better position than his assignor.' This is true, so "far as relates to the cause of action. The assignee takes "the cause of action which the assignor had, and no "other. If the assignor had no cause of action against the "defendant, the assignee acquires none. The defence, "however, which is here urged does not touch the cause "of action, but only the right of the party to prosecute in "our courts a conceded cause of action. That right, de- "pending upon the residence of the plaintiff, and not "upon the right of action, the plaintiff, being a resident, "can maintain the action when his assignor could not. "There was no proof in regard to the plaintiff's residence "at the time of the commencement of the action, but if his "non-residence was relied upon as a defence, the burden "of proof on that subject rested on the defendant.

"It is insisted that the assignment was merely color- "able, and a fraud upon the statutes of New York. There "is nothing in the case to show that when the assignment "to the plaintiff was made he was a resident of New York, "or if he was, that the assignor was informed of that "fact. In the absence of either of those facts, it is clear "that no fraud upon the statutes referred to could have "been intended. Fraud is not to be presumed, and if

"there was any evidence from which it could be inferred, "the defendant should have asked to have that question "submitted to the jury. This objection to the recovery "rests upon the position that fraud was conclusively "shown. Clearly, it was not so shown, or even presump- "tively.

"But if it had appeared that the object of the transfer "of the cause of action was to obviate this objection to "the person of the plaintiff, it would not have been a "fraud, either against the statute or the defendant. All "that the statute requires is that the plaintiff shall be "'a resident of this State (Code, Sec. 427), and if he has a "valid cause of action against the defendant, his motives "in obtaining it cannot be inquired into."

By Mr. Justice Balcom (p. 455):

"The action must have been commenced by attachment, "because the defendants are a foreign corporation. But "we must presume the plaintiff is a resident of this State, "for there is nothing in the case to show the contrary; "and if he was not a resident of the State when the action "was commenced, the defendants should have moved on "affidavits and notice to set aside the proceedings in it, "instead of answering the complaint.

"The position taken by the defendants' counsel that "the plaintiff could not maintain the action because his "assignors were a foreign corporation and could not "commence an action by attachment against the de- "fendants in the Supreme Court of the State is clearly "untenable."

In December, 1862, one Petersen, a resident of New York, brought an action against the Chemical Bank. In his complaint he alleged that one Cohen had died in New Haven, having a balance to his credit in the Chemical Bank of $32,321.24; that one Peck had been appointed ad-

ministrator in New Haven, and had assigned the claim against the Chemical Bank to Petersen, the plaintiff.

The answer of the Chemical Bank denied the assignment and further alleged as follows:

"And they further allege on information and belief "that the assignment to the plaintiff, alleged in the "complaint, is not *bona fide* and was made without "consideration."

Upon the trial the plaintiff put in evidence an assignment in writing by Peck, the administrator, to himself, expressed to be for the consideration of $32,321.24, *and guaranteeing the collection of the claim and indemnifying Petersen against any loss by reason of his purchase of it.*

The defendant proved, upon the cross-examination of Peck and Petersen, that Petersen was Peck's counsel; that he had made his cheque to Peck for the exact amount of the claim, and had deposited it in his (Petersen's) own bank to his (Petersen's) own credit "as trustee," and that that was the only way he had paid for it, and that assignment of the claim had been advised, because the administrator's assignee could sue in New York, and the administrator himself could not.

The trial court directed a verdict for the plaintiff.

Ct. Appeals Cases, State Lib., Vol. 159, Appeal Book, pp. 9, 13, 15, 44, 56, 60, 62.

Judgment was entered; the defendant appealed, and the Court of Appeals said:

Petersen *vs.* Chemical Bank, 32 N. Y. 21.

By Ch. Judge Denio:

"Hence there is not, I think, any reason why the plain- "tiff should be precluded from maintaining his action, on "account of his making title through a foreign adminis- "tration. The rule is not that our courts do not recognize

"titles thus acquired. It is simply that a foreign executor "or administrator can have no standing in our courts. "The plaintiff does not occupy that position. He sues in "his own right and for his own interest, and represents "no one. In my opinion, the disability to sue does not "attach to the subject of the action, but is confined to the "person of the plaintiff. If he is an unexceptionable "suitor, and there is no rule of form or of policy which "repels him from our courts, he is to be received, and he "may make out his title to the subject claimed, in any "manner allowed by law; and it has been shown that "title acquired through a foreign administration is univer-"sally respected by the comity of nations.

"It is pretty obvious from the evidence of the circum-"stances of the transfer by Peck to the plaintiff, that its "object was to avoid the objection which might be taken "if Peck had sued in his own name as administrator, "without taking out letters here. There was no other "conceivable motive for the plaintiff to purchase this "moneyed demand payable immediately, for its precise "amount paid down. If his check on the bank, drawn "shortly after the transfer, had been answered, he would "have received the precise amount he had parted with, "and the transaction at the best would have been paying "with one hand to receive the same amount back with "the other. If he failed to realize the amount he was to be "indemnified by Peck. This circumstance and the man-"ner in which the assumed consideration was disposed of, "would doubtless have led the jury to find that the form "adopted was resorted to in order to enable the adminis-"trator to avail himself of the balance in the defendant's "bank, without taking out administration here. Still, "as between plaintiff and Peck, the interest in the demand "passed. Peck would have been estopped by his convey-"ance under seal, containing an acknowledgment of the

"payment of the consideration, from setting up that "nothing passed by the conveyance. I am of opinion "that the defendant cannot make a question as to "the consideration. If all the parties had been "residents of this State, a transfer of the demand, "good as between the parties to that transfer, would "have obliged the defendant to respond to the action of "the transferee. Then if we hold, as I think we should, "that the objection to the suit of the administrator was "in the nature of a personal disability to sue, and not an "infirmity inhering in the subject of the suit, the fact "that the transfer was made for the purpose of getting rid "of the objection, should not prejudice the plaintiff. The "cases which have been referred to upon this point have "considerable analogy. The Constitution and laws of the "United States confer upon the courts of the Union, jur-"isdiction in suits between citizens of different States, "with an exception contained in an act of Congress, of "one suing as the assignee of a chose in action, of a party "whose residence was such as not to permit him to sue. "In an action by an assignee concerning the title to land, "which was not within the exception, it was held not to "be an objection which the defendant could take, that "the assignment was made for the purpose of removing "the difficulty as to jurisdiction (Briggs *vs.* French, 2 "Summ., 251). In a late case in this court against a for-"eign corporation which could not be prosecuted here ex-"cept by a resident of this State, unless the cause of action "arose here or the subject of the action was "situated here, it was held that the objection—that "the assignment of the demand by one not qualified by "his residence to sue, to the plaintiff, who was thus quali-"fied, was made for the purpose of avoiding the difficulty "—could not be sustained. (McBride *vs.* Farmers' Bank, "26 N. Y., 450).

"I have not thus far referred to the circumstances that "Cohen was shown not to have owed any debts in this "State. That fact was proved as strongly as in the nature "of the case such a position could be established. The "administrator, whose business it was to ascetain the ex- "istence of debts, and the confidential servant of Cohen, "who was very familiar with his transactions, affirmed "that there were none; and the defendant gave no evi- "dence on the subject. The motive of policy for forbid- "ding the withdrawal of assets to the prejudice of domes- "tic creditors did not therefore exist in this case. Still, "if the rule is that neither the foreign administrator nor "his assignee can maintain an action in our courts to col- "lect a debt against a debtor residing here, on account of "its tendency to prejudice domestic creditors, the excep- "tional features of the present case would not change the "principle. It would often be more difficult than in this "case to disprove the existence of such debts. But I am "of the opinion that the objection should be regarded as "formal, and that it does not exist where the plaintiff is "not a foreign executor or administrator, but sues in his "own right, though his title may be derived from such a "representative."

By Mr. Justice Potter (p. 50):

"The action in this case is not brought by the executor, "and the authority of the executor is only in question so "far as to determine what I think is the real point in this "case, to wit: Can the executor, within the State of "Connecticut, alien a demand, due to his testator from a "person living in this State, so that the alienee, or as- "signee, can bring an action in his own name? 1. I "know of no statute restraint upon the right of aliena- "tion in this State; none was shown to exist in Connecti- "cut, and restraints have never been favored at common

"law. 'It is a rule of common law that the power of "'alienation is an inseparable incident to the right "'of property, for the law knows of no such anomaly "'as the right of property without the absolute and "'universal power of disposal.' (Bell on Husband and "Wife, 504.) In Fettiplace *vs.* George (1 Ves., 49), "Lord Thurlow said: 'The moment property can be "'enjoyed, it must be enjoyed with all its incidents.' "And Lord Coke cites a Latin maxim, the translation of "which is, that it is unjust that freemen should not have "'the free disposal of their own property' (Co. Litt., "223, *a*). This right of alienation or right to sell is not "more free and unrestricted than the right to purchase. "This assignment constituted a legal transfer of the claim "in question to the plaintiff, the fact being found by the "jury. 2. What, then, are the plaintiff's rights, as the "legal owner of this claim? Since choses in action are "made assignable by statute, the action need not be "brought in the name of the executor, but must be "brought in the name of the party in interest. (Code, "Secs. 111, 112, 113.) The action is then brought in the "right name. The assignee, of course, has purchased "the claim subject to all equities which the defendants "had against the assignor, but no equities are claimed "against it by the defendants. The objection that the "assignee had no right to sue until he showed himself "qualified is not an equity set up against the demand. "The objection to the qualification of the executor might "be true; he could not sue a demand in Connecticut "until he obtained his letters testamentary there; he "probably cannot sue in this State without ancillary "letters obtained here, but all this has nothing to do "with the validity or the equities of the demand itself. "The defendants set up no equities against the demand "itself, nor against the testator by counterclaim, recoup-

" ment or offset. They stand in no relation of trustees " for the creditors of the testator residing in this State, if " any there were. They are bound to pay their liability, " whenever a person lawfully authorized to discharge it " presents it for payment. The personal disability of the " executor to sue is no defense to this action when " brought by one against whom no such disability exists. " This was settled by the late case of McBride *vs.* Farmers' " Bank (26 N. Y., 450). The principle established in " that case is, I think, conclusive of this. This claim in " this case is conceded to be just; there is no legal or " equitable defense to it on the merits; it was legally " assigned to the plaintiff; he holds it absolutely; he is " under no legal disability to sue. The principle insisted " on by the defendants 'that the assignee of a foreign " 'executor stand in no better position than the exec- " 'utor himself, who can confer no rights that he does " 'not himself possess,' is true so far as the merits of the " question, or the absolute rights of others are concerned, " and so far as the act of the executor or the rights of " his assignee shall come in conflict with the local policy " or laws of this State, or with the rights of its citizens. " No such conflict appears to me to exist in this case."

In 1859 the Legislature amended Section 134 (Chapter 428, Laws 1859, p. 968) so that the first subdivision of it read as follows:

" § 134. The summons shall be served by deliver- " ing a copy thereof as follows:

" 1. If the suit be against a corporation, to the " president or other head of the corporation, secre- " tary, cashier, treasurer, or director or managing " agent thereof; but such service can be made in " respect to a foreign corporation only, when it has " property within this State, or the cause of action " arose therein, *or where such service shall be made*

" *within* this State personally upon the president, " treasurer or secretary thereof.

In Gibbs *vs.* Queen Ins. Co., 63 N., Y., 114, the service was upon a person designated as a person " upon whom process of law can be served." (63 N. Y., 115.)

In January, 1877, the Court of Appeals decided *Sheridan* vs. *The Mayor* (68 N. Y., 30), above quoted.

These cases (*McBride* vs. *Farmers' Bank* and *Peterson* vs. *Chemical Bank* and *The Sheridan* vs. *The Mayor*) remaining unquestioned—as they have so remained ever since—the Code of Civil Procedure came to be enacted.

Chapter XV., which is the one with which we are concerned, was enacted in 1880. The Commissioners of the Code had reported it to the Legislature of 1875, and it had passed both Houses in 1877, 1878 and 1879; but in 1877 it was not signed, and in 1878 and 1879 it was vetoed by the Governor.

As reported it contained Section 1706, which, when finally enacted as Section 1780, read, and still reads, as follows:

" § 1780. An action against a foreign corporation may be " maintained *by a resident of the State*, or by a domestic " corporation, *for* ANY *cause of action*. An action against " a foreign corporation may be maintained by another " foreign corporation, or by a non-resident, in one of the " following cases only:

" 1. Where the action is brought to recover damages " for the breach of a contract made within the State, or " relating to property situated within the State, at the " time of the making thereof.

" 2. Where it is brought to recover real property " situated within the State, or a chattel, which is replev- " ined within the State.

"3. Where the cause of action arose within the State, "except where the object of the action is to affect the "title to real property situated without the State."

This section as thus enacted is identical with the drafts as reported, except as to the first sentence. This, in the draft, read:

"An action against a corporation, created by or "under the laws of the United States, or of any "other State or country, may be maintained by a "resident of the State, or a corporation created by or "under the laws of the State." (Comrs.' Report of 29 January, 1875, p. 809; Pt. III., Chap. XV., § 1706.)

The change in the enactment is thus simply to add the words "for *any* cause of action"; thus making it the stronger for the purpose of this argument.

The report of the Commissioners upon this proposed section concluded with the following:

"It is evident that this section is open to a criticism, *which also applies to the existing statute*, namely, that its restrictions may be evaded *by an assignment of the cause of action to a resident. But, generally, the assignment will obviate the objection to the bringing of the action; and in most cases where it will not, section 1811, post, will prevent the violation of any grave principle of public policy.*" (Report of 29 January, p. 810.)

This has been commonly published as a note in the editions of the Code ever since. The reference being to section 1910 instead of 1811, the former being the number which section 1811 of the draft took in the enacted Code of Civil Procedure. Throop's Code, § 1780, note.

Section 1811 of the draft was as follows:

"§ 1811. The transfer of a cause of action passes an "interest, which the transferee may enforce by an action

"or special proceeding in his own name, or interpose as a "counterclaim, *in like manner as the transferor might* "*have done*, subject to any defense or counterclaim exist- "ing against the transferee, or against the transferor "before notice of the transfer. But a cause of action "cannot be transferred in either of the following cases:

"1. Where it is to recover damages for an injury to "person or character, or for a breach of promise of "marriage;

"2. Where it is founded upon a grant, which is made "void by a statute of the State, or flows out of real prop- "erty, a grant of which by the transferor would be void "by such a statute:

"3. Where a transfer thereof is expressly forbidden by "a statute of the State or of the United States, or would "contravene public policy.

"A cause of action to cancel or otherwise affect an in- "strument executed, or act done, by way of security for "a usurious loan or forbearance, can be thus transferred, "where such instrument creates a specific charge upon "property, which is also transferred in disaffirmance "thereof, and not otherwise; but, in that case, the trans- "feree does not succeed to the right conferred by statute "upon the borrower to procure relief, without paying or "offering to pay any part of the sum or thing loaned" (Comrs' Report, 29 January, 1875, p. 877).

As finally enacted the words above italicised are left out, and the whole section reads thus:

"§ 1910. ANY *claim or demand can be transferred*, ex- "cept in one of the following cases:

"1. Where it is to recover damages for a personal "injury, or for a breach of promise to marry.

"2. Where it is founded upon a grant, which is made "void by a statute of the State; or upon a claim to or

" interest in real property, a grant of which, by the trans-
" ferror, would be void by such a statute.

"3. Where a transfer thereof is expressly forbidden by
" a statute of the State, or of the United States, or would
" contravene public policy."

And the report and the note to the section expressly state that it was intended to make "every cause of action
" assignable not included within one of the special excep-
" tions."

In this condition the laws have since remained.

In Ervin *vs.* Oregon Railway and Nav. Co., 28 Hun, 269, the General Term of the Supreme Court, New York, said, in 1882 (p. 273), " *There is no doubt* that a claim
" against a foreign corporation by a non resident can be
" assigned to a resident of this State *for the express pur-*
" *pose of enabling him to sue and thus to avoid a dis-*
" *ability which would otherwise exist.* (*McBride* vs.
" *The Farmers' Bank of Salem*, 26 N. Y., 450; *Petersen*
" vs. *Chemical Bank*, 32 *id.*, 40–48.)"

Barth *vs.* Backus, 140 N. Y., 230, was begun 31 December, 1891.

Barth was general assignee of the Wilkin Manufacturing Company, a Wisconsin corporation, appointed under a statute of Wisconsin. The defendants were citizens of New York, assignees of Wisconsin creditors. They, the defendants, had attached property of the Wilkin Manufacturing Company in New York, the attachments having been levied after the assignment had been made. Barth sued to recover the property. The trial court found as facts:

" VII.—That the claims against the Wilkin Manufac-
" turing Company set forth in the answers herein, were
" assigned by the owners thereof, *who were citizens and*
" *corporations of the State of Wisconsin*, after they be-
" came due, and after said voluntary assignment to the

" plaintiff, and with knowledge of said voluntary assign-
" ment.

" VIII.—That the defendants, The St. Lawrence County
" Bank and the Bank of America, accepted said claims
" with knowledge of said assignment by the Wilkin Manu-
" facturing Company to the plaintiff.

" IX.—That said claims were assigned by the owners
" thereof *and accepted by the defendants*, The St. Law-
" rence County Bank and the Bank of America, *for the*
" *purpose of attaching the debt due from the Canton*
" *Lumber Company, and in order to obtain a preference*
" *over the other creditors of the Wilkin Manufacturing*
" *Company*," Ct. Appeals cases, State Lib., vol. 1749,
" case 6, p. 17.

The court said, 140 N. Y., 230, 238:

" It is insisted, however, in behalf of the plaintiff that
" assuming that the title of the assignee would be sub-
" ordinate to the lien of attachments, issued here at the
" suit of resident creditors, this priority cannot be claimed
" in behalf of Wisconsin creditors who, knowing of the
" assignment, seek to gain a preference under our attach-
" ment laws, and that the banks to whom the claims were
" assigned after maturity, and who took with notice of
" the assignment, stand in no better position than the
" original creditors. In some of the States, which refuse
" to recognize the validity of the title of a foreign as-
" signee, even in case of voluntary assignment, where it
" comes in conflict with the claims of domestic creditors,
" a distinction is made, and it is held where the domicile
" of the foreign assignee and the creditors is the same,
" the latter will be bound by the title of the former, good
" by the law of the common domicile. (May *vs.* Wanne-
" macher, 111 Mass., 202; Sanderson *vs.* Bradford, 10
" N. H., 260; Moore *vs.* Bonnell, 2 Vroom, 90.) The
" principle of comity in these States is held to apply so

" as to subject non-residence to the operation of the for-
" eign law, but not so as to prevent domestic creditors
" from pursuing their remedy in defiance of the foreign
" assignment. (Faulkner *vs.* Hyman, 142 Mass., 53.)

" The question is not an open one in this State. We
" have refused to adopt the distinction made in some of
" the States, and have placed the right of a creditor com-
" ing here from the State of the common domicile upon
" the same footing as that of a citizen or resident creditor,
" and have sustained the lien of an attachment issued
" here at the instance of a foreign creditor after proceed-
" ings in insolvency had been instituted in the State of
" the common domicile of the insolvent and creditor.
" (Hibernia Natl. Bank *vs.* Lacombe, 48 N. Y., 367.)
" There the debtor and attaching creditor were Louisiana
" corporations. The attachment was issued after the
" debtor bank had been placed in liquidation under the
" laws of that State and commissioners had been ap-
" pointed to take possession of and administer its assets.
" Danforth, *J.*, after stating the general rule that the law
" of Louisiana could have no operation here, referring to
" the point now under consideration, said: 'The plain-
" 'tiff, as we have seen, although a foreign creditor,
" 'is rightfully in our courts pursuing a remedy given by
" 'our statutes. It may enforce that remedy to the same
" 'extent, and in the same manner, and with the same
" 'priority, as a citizen. Once properly in court and
" 'accepted as a suitor, neither the law nor court admin-
" 'istering the law will admit any distinction between the
" 'citizen of its own State and that of another.' How
" far our courts will enforce the title of a foreign assignee
" in bankruptcy as between the assignee and the bank-
" rupt or his creditors, where all the parties have a com-
" mon domicile abroad, was much discussed in the case
" of *Abraham* vs. *Plestero* (3 Wend., 548), and that case,

" with others, were reviewed in the case of *In re Waite*
" (*supra*). The authority of *Hibernia Bank* vs. *Lacombe*
" upon the point now in question was expressly recognized
" and approved in *Warner* vs. *Jaffray* (96 N. Y., 248), and
" it must be regarded as establishing the law of the State on
" the subject. In Warner *vs.* Jaffray the court refused to
" interfere with liens acquired by citizens of this State upon
" personal property in another State under the laws of
" that State belonging to an insolvent resident here under
" proceedings commenced after a voluntary assignment
" for the benefit of creditors, valid by the laws of this
" State, had been made and delivered. It was in sub-
" stance held that creditors of the assignor, citizens of
" this State, were not, because of such citizenship, pre-
" cluded from taking proceedings in another State hostile
" to the assignment, for the purpose of acquiring priority
" in respect of personal property situated there embraced
" in the assignment. (See, also, Johnson *vs.* Hunt, *supra.*)
" The Courts of this State accord to our citizens the same
" liberty to proceed in another jurisdiction in hostility to
" assignments executed here which they accord to citizens
" of other States coming here and instituting proceedings
" in hostility to transfers in insolvency, valid by the laws
" of their domicile. The rule in New York on the ques-
" tion is also the rule in other States. (McClure *vs.* Camp-
" bell, 71 Wis., 350; Rhawn *vs.* Pearce, 110 Ill., 350;
" Boston Iron Works *vs.* Boston Locomotive Works,
" 51 Me., 585; Upton *vs.* Hubbard, *supra.*) It follows,
" therefore, that the attachments in question created valid
" liens on the debt attached in priority to the title under
" the assignment, assuming the claim of the plaintiff that
" the banks stood in no better position than the Wisconsin
" creditors."

Note that *Barth* vs. *Backus* was between the assignees and the assignee for the other creditors;

that is between the assignee and the other creditors themselves.

At the time of the enactment of the above provisions of the Code of Civil Procedure, it had been settled by the following mass of decisions of the Court of Appeals besides *McBride* vs. *Farmers' Bk.* (26 N. Y., 450); Peterson *vs.* Chemical Bk. (32 N. Y., 23), and Sheridan *vs.* The Mayor (68 N. Y., 30), already quoted, that no one but *a creditor of the assignor* could question an assignment for any cause—want of consideration; that it was sham or colorable, or fictitious; or even fraud—nor that the consideration was to be paid in the future—or only paid unless collected on the claim—or that assignee was to pay the assignor what he collected on the claim.

Dec., 1862—Cummings *vs.* Morris, 25 N. Y., 625, 627.

Jan., 1864—City Bk. of New Haven *vs.* Perkins, 25 N. Y., 554.

In this case it was held that a defendant could not set up a defense to an action on bills of exchange, that they were the property of a bank, and were transferred or pledged to the plaintiff as security for a loan by the cashier, *who had no authority so to transfer or pledge them.*

Jan., 1867—Aubrey *vs.* Fiske, 36 N. Y., 47.

Mch., 1867—Brown *vs.* Penfield, 36 N. Y., 473.

Suit on two drafts for $2,000. "If that firm chose "to part with these notes to Percy for five dollars, it "is not the province of the defendants to question "the transaction" (p. 476).

June, '69—Bostwick *vs.* Wenck, 40 N. Y., 383, 385.

Dec., '70—Allen *vs.* Brown, 44 N. Y., 229.

In *Allen* vs. *Brown*, there was a written assignment by Cook to Allen. Cook testified: "Allen paid me "nothing and I agreed with him that I would take "care of the case, and if he got beat it should not

"trouble or cost him anything"; and the agreement further was that the assignee should be liable to assignors "as their debtor" under his contract with them "for the amount realized."

May, 1871—Meeker *vs.* Cleghorn, 44 N. Y., 349.

In this case it appeared that the "assignor expects "to get his money if it is recovered" by the assignee in the action.

June, 1871—Daly *vs.* Ericsson, 45 N. Y., 706, 709.

Sept., 1865, and Jan., 1872—Eaton *vs.* Alger, 2 Keyes, 41, 43; 47 N. Y., 345, 349.

C delivered to plaintiff a promissory note for $629.75 upon plaintiff's undertaking to collect at his own expense, and upon its collection pay to C $600, the original amount of the note.

Dec., 1870—Mallory *vs.* Horan, 49 N. Y., 114, 117.

May, 1875—Stone *vs.* Frost, 61 N. Y., 614.

Apl., 1879, Seymour *vs.* Fellows, 77 N. Y., 178.

An assignment by a husband directly to his wife.

Snyder *vs.* Snyder, 96 N. Y., 88, 93.

Assignee of an executor's claim can sue the executor, while the executor himself is confined to the statutory remedy.

Cornell *vs.* Donovan, 13 State Rep., 741.

Trial Court found as a fact that "the assignments "of the judgment were merely for the purpose of "protecting said defendant Harrington from any "liability arising from the aforementioned under-"taking, but they were to that extent to be abso-"lute."

And the same doctrine is stated and some of the above cases cited in the report and note to Section 1910 of the Code of Civil Procedure.

And by the rule of the United States Courts,

also, the fact that the motive is to qualify the assignor to sue, does not defeat the jurisdiction, although it is plain that the question is far different from the question here.

The Supreme Court of New York is a court of *general* jurisdiction, and, of course, anybody can sue in it for any cause of action, except as to the very few matters where exclusive jurisdiction has been granted away by the Constitution of the United States.

The Circuit Courts of the United States are not only of very limited jurisdiction, but during the time to which the cases to be quoted relate their jurisdiction as to this sort of matter was further limited by the following:

"That if * * * it shall appear * * * that such suit "does not really and substantially involve a dispute or "controversy properly within the jurisdiction of said "Circuit Court, or *that the parties to said suit have been* "*improperly or collusively made* or joined, either as "plaintiffs or defendants, *for the purpose of creating a* "*case cognizable* or removable *under this act*, the said "Circuit Court shall proceed no further therein, but shall "dismiss the suit," &c.

Act 1875, Sec. 5, 19 Stat. at Large, 472.

Under this act the following was held:

Crawford vs. *Neal*, 144 U. S., 485, by Mr. Chief Justice Fuller, p. 593.

"If the transfers of the judgments to the complainant "were fictitious, the plaintiffs therein continuing to be "the real parties in interest, and the complainant but a "nominal or colorable party, his name being used only "for the purpose of jurisdiction, then the objection to the "jurisdiction of the Circuit Court would be well taken;

" but if the transfers were absolute and the judgment " creditors parted with all their interest for good consider- " ation, then the mere fact that one of the motives of the " purchase may have been to enable the purchaser to bring " suit in the United States Court, would not be sufficient " to defeat the jurisdiction. *McDonald* vs. *Smalley*, " 1 Pet., 620; *Barney* vs. *Baltimore*, 6 Wall., 280; " *Williams* vs. *Nottawa*, 104 U. S., 209; *Manufacturing* " *Co.* vs. *Bradley*, 105 U. S., 175, 180; *De Laveaga* vs. " *Williams*, 5 Sawyer, 573, per Mr. Justice Field:

" It was established by the testimony of members of the " firm of Sibson, Quackenbush & Co. that their judgment " was sold to Neal for his note for $5,000; that the firm was " not concerned in any way in the result of the pending " litigation, and had parted with its entire interest in the " judgment; and by the testimony of a member of W. C. " Noon A.Co., that that firm sold its judgment to Neal for " $500, absolutely and without condition. The plaintiffs " in these judgments retained no interest whatever " therein.

" But it is said that Neal knew nothing about the trans- " action; that the alleged consideration was never paid; " and that the State Courts had previously held the con- " veyances valid; thus justifying the inference that the " purchase was in pursuance of a collusive attempt to re- " litigate the question in the United States Courts.

" It is true that the averments of the cross-bill filed " against Goltra and admitted by his demurrer show that " Goltra attacked the validity of the conveyances in the " State Circuit Court; that the conveyances were sus- " tained; and that his appeal to the Supreme Court was " dismissed; but, as already said, *the mere wish to bring* " *suit in the United States Court, as a motive for the* " *purchase of these judgments, is not enough if the pur-* " *chase was in fact made.*"

As to the second question, Mr. Pangburn is made to say in his examination, "Mr. Paige told me when he handed "me the notes that he wanted me to hold them so that he "could commence a suit in my name," and "the whole "matter he wanted to use my name, and I let him with "the understanding that if there was anything in it I was "to get something out of it."

On the stand in this case he denied this; but, let us suppose it to be true, it will not make any difference.

Section 449 of the Code of Civil Procedure is as follows:

"§ 449. Every action must be prosecuted in the name "of the real party in interest, except that an executor or "administrator, *a trustee of an express trust*, or a per- "son expressly authorized by statute, *may* sue, without "joining with him the person for whose benefit the action "is prosecuted. *A person with whom or in whose name "a contract is made for the benefit of another, is a trus- "tee of an express trust, within the meaning of this "section.*"

The most of the cases already cited bear upon this question. The latest case in the books is

Bedford vs. *Sherman*, 68 Hun, 317, 321.

The plaintiff, being cross-examined, testified as follows (Appeal Book 2352, Supreme Ct. Cases, State Library, 81):

Plaintiff cross-examined:

"Then they sold the notes to me, some time the last of "March, 1891. *I did not pay them anything for them.* "*The fact is they simply brought the action in my name.* "As a matter of fact I think the notes are mine to-day. "It does not make any difference what consideration I "paid for them; it is not necessary that they should "endorse them to me.

"Q. That you think as a matter of law is not necessary? "A. It is not necessary; it is an open endorsement, any-

" way; it is good in anybody's hands if it is good for " anything.

" Q. Without recourse? A. Certainly.

" Q. Merchants' Bank by F. W. Fiske, Cashier? A. " Yes, sir.

" Q. Your idea being that that being an open endorse- " ment the other endorsement was not necessary? A. Is " not necessary.

" Q. And for that reason you are owner? A. Certainly " I am owner. They made a proposition to me by assign- " ment. The assignment is in writing, assigned to me " for the purpose of bringing this suit.

" Q. And for anything else? You do not mean to say " that if you should recover on these notes and collect " this money, that you intend or expect to pocket " the money yourself, it would go to the other fellows, " wouldn't it? A. Well, that is a question.

" Q. Would not the money go to them? A. Well, I " do not know whether it would or not. I might die in " the meantime. I am the absolute owner of it to-day, " and my wife might think differently.

" Q. Do you think they would be entitled to it? A. " That is another question. I do not know whether they " would or not; that is my property as it stands abso- " lutely.

" Q. What did you pay for them? A. Nothing.

" Q. Do you mean to tell the jury that they made a gift " of it to you, and all the proceeds? A. No, sir; they " have not made a gift of it to me yet, except as they " have assigned it to me."

Eleven assignments, all in the same form, were then put in evidence; one of them is as follows (p. 82):

" In consideration of the sum of one dollar to me in " hand paid, the receipt whereof is hereby acknowledged " by John M. Bedford, of Buffalo, in the County of Erie,

"State of New York, I, Florence S. Clark, of said Buf-
"falo, do hereby sell, assign, transfer, set over and con-
"vey to said John M. Bedford, his executors, adminis-
"trators and assigns, all my right, title and interest in
"and to any and all promissory notes made by the Sher-
"man Brothers & Company, Limited, a corporation duly
"established and organized under and by virtue of the
"laws of the State of New York, and in and to any and
"all warehouse receipts issued by the Associated Ele-
"vators or by the Lake Shore Elevating Company, or by
"the International Elevating Company, or by the Buffalo
"Elevating Company, and I do hereby constitute the said
"John M. Bedford, my attorney, in my name or other-
"wise to take all legal measures which may be proper or
"necessary for the complete recovery and enjoyment of
"the assigned premises."

He then further testified (p. 90, fol. 358): "These as-
"signments were executed and delivered to me at the
"time they bear date respectively, before the commence-
"ment of this action." (P. 90, fol. 360.) "I was simply
"doing what they requested me to do. All the interest
"I have in this matter is that represented by these as-
"signments.

Upon his direct examination he had given this testimony (p. 79, fol. 316): "I am the owner and holder of these "notes mentioned in the complaint."

Upon this state of the proof the trial court directed a verdict for the plaintiff for $268,516.78 (p. 154, fol. 616).

The General Term (March, 1893) ordered judgment on the verdict, the Court, as to this part of the case saying (Mr. Justice Lewis) (Bedford *vs.* Sherman, 63 Hun, 317, 321):

"As we have seen, for the purpose of convenience, by
"proper instruments in writing, the legal title to the
"notes and receipts was put in the plaintiff.

"As between plaintiff and the elevators and their stock-
"holders, the evidence tends to show he occupied the
"relation of trustee.

"He testified that he paid nothing for the notes or the
"stock.

"He had acted for the stockholders in settling their
"affairs with Eberman Brothers & Company, and he took
"an assignment of the claim for the purpose of bringing
"the action.

"The indebtedness to the banks was incurred in 1888
"and 1889, before the corporation was dissolved.

"The notes were transferred to the stockholders of the
"elevators by the banks in September, 1889; they were
"assigned to the plaintiff on the 17th day of March, 1891,
"after the dissolution of the corporation.

"It is provided by Section 39 of the Act of 1875, 'that
" 'the dissolution of the corporation shall not take away
" 'or impair any claim or remedy existing against the
" 'corporation, its stockholders or officers, for any liability
" 'incurred previous to its dissolution.'

"The claims were unquestionably valid in the hands of
"the transferees of the banks, and no reason is apparent
"why they could not transfer their claim to the plaintiff.

"It has been held that a naked transfer of the penalty
"cannot be made without a transfer of the claim, but the
"penalty is an incident of the claim and passes to its
"transferee.

"The notes endorsed in blank were delivered to the
"plaintiff, accompanied by written transfers in form suffi-
"cient to pass the title, and this gave the plaintiff valid
"title as against the assignors.

"The defendants would be protected should they pay
"to the plaintiff any judgment which he might recover
"thereon; plaintiff's assignors would be estopped from
"thereafter making any claim against the defendant.

"The plaintiff having obtained the legal title to the "claim, the defendants are not concerned to inquire as to "what consideration he may have paid therefor (*Sheridan* "vs. *The Mayor, etc.*, 68 N. Y., 30)."

Wetmore vs. *Hegeman*, 88 N. Y., 69.

The claim (for $34,585.41, see Judgment, Appeal Book, p. 224), was assigned by the receiver of the firm of Campbell & Moody, under order of the Court, to James S. Blackwell, for consideration of $130.77 (Appeal Book, p. 167).

And the Court said, by EARL, *J.*: "And thus he (Black- "well) became vested with the entire legal title to the "claim. Afterward Blackwell died, and his adminis- "tratrix assigned the claim to the present plaintiff, Wet- "more, and thus the legal title to the claim became vested "in him" (p. 71).

At the time of his assignment Therasson, Bryan and Wetmore signed a paper, in these words:

(Title to the action.)

"James M. Blackwell, having become the assignee of "the claim in this action for the benefit of Therrasson & "Bryan, to whom it belongs, and he having departed this "life with the legal title thereto still in him and his widow "being about to take out letters of administration on his "estate and being about to assign the said claim to such "persons as they may request; it is agreed that such last- "mentioned assignment be made to George C. Wetmore, "who is to prosecute and collect the said claim, upon the "understanding, however, that the proceeds are to be held "by him in trust, subject to written order or orders, to "be signed by both Louis F. Therasson and John A. "Bryan individually, their legal representatives and "assigns, and they are to hold him harmless and indemni- "fied against all expenses, cost and loss in and about the "premises." (Appeal Book, p. 206.) (14 December, 1876.)

The opinion continues (p. 71):

"It appears that Blackwell took the assignment from "Gilbert and from the Receiver at the instigation and "request of Therasson & Bryan, a firm of lawyers, and "that he took and held the claim expressly in trust for "them, he having no interest therein except as such trus-"tee. It also appeared that the assignment from Black-"well's administratrix to this plaintiff was made at the "request and instigation of Therasson & Bryan, and for "their benefit, and that the plaintiff took the assignment "to himself and holds the claim expressly in trust for "them. The title of the plaintiff, therefore, for the pur-"poses of this action is just as valid and effectual for "every purpose as if he held the claim absolutely in his "own right. The title has been placed in him by the only "persons interested therein against the defendant. *Re-"covery by him and payment to him will be an absolute "protection to the defendant, and that is all he can "require.* He alleges no equities, set-offs or counter-"claims against Therasson & Bryan, and hence their "absence as parties to the action can in no way harm or "embarrass him. The plaintiff is, therefore, within the "meaning of Section 113 of the Code of Procedure, a "trustee of an express trust, and can, therefore, maintain "this action without joining with himself the persons "beneficially interested in the claim. (*Considerant* vs. "*Brisbane*, 22 N. Y., 389; *Allen* vs. *Brown*, 44, *id.*, "228; *Greene* vs. *The Niagara Fire Ins. Co.*, 6 Hun, "128; *Cummins* vs. *Barkalow*, 1 Abb. Ct. App. Dec., "479)."

And see *Matter of Estate of Strant*, 126 N. Y., 210.

III. The Validity of the Debt.

1. As to the five notes mentioned first in the statement of facts, there can be no question. There is no pretense that there was any renewal.

2. As to the remaining notes, the possession of the bank is sufficient proof both of title and consideration.

Dolfus vs. *Trosch*, 1 Den., 367.

Dugan vs. *United States*, 4 Wheat., 172, 183.

And here the consideration is proved, *i. e.*, an indebtedness of over three hundred thousand dollars.

Nor is the claim of payment made out. Although renewals were issued, they were not discounted, except in one instance.

(See Statement of Facts.)

3. There was one note which, when it came due, was charged to the account of the Natchaug Company, and a renewal note, less the discount, was credited, *but the old note was not surrendered, but kept.* When that note came due it, also, was discharged and a renewal note, less the discount, credited, but in this case, also, *the old note was not surrendered, but kept.* When the third note came due it also was charged and a renewal note, less the discount, was credited, and in this case also *the old note was not surrendered, but kept.*

Here are four notes in the bank representing the same debt.

Mr. Dooley assigned the note which was the earliest in time.

"It is a settled rule of law," said Mr. Justice KENT, delivering the opinion of the Supreme Court of New York, in *Herring* vs. *Sanger* (3 Johns. Cas., 71), in 1802, "that "accepting a note for a debt due, is no payment of the

"debt, unless it be specially so agreed, *or unless the "creditor negotiates the note.* It can only postpone the "time of payment of the debt, until a default in the pay- "ment of the note (1 Salk, 124, 7 Term Rep., 66; 1 Esp. "Cases, 3, 4, 5, 6; Term Rep , 655)."

In 1816, in *Parker* vs. *United States*, Pet C. C., 262, 266–7, the court—Mr. Justice WASHINGTON—said:

"If the vendor of property accept of a note or bill, in "satisfaction of his debt, he is paid by his own agreement; "provided there was no fraud or unfairness on the part of "the vendee; as if the bill were drawn on a person not "having funds. *So, if* without an agreement to receive "the note in satisfaction, *the vendor transfer the note, he "thereby exposes the vendee to a responsibility to pay the "same to the holder; which as long as it continues* IS A "BAR TO AN ACTION *against him upon the original con- "tract, because otherwise he might be charged twice for "the same debt. Besides the assignment of the note is so "far a satisfaction received from the endorsee, that the* "VENDEE CANNOT SUE UPON THE ORIGINAL CONTRACT, "*unless he gets back the note and has it in his power to "return it to the vendee.* In short, he cannot have the bene- "fit of the security, which he received as a conditional pay- "ment, and at the same time insist to be paid the debt for "which that security was given" (pp. 266–7).

In *Tear* vs. *Chrystie* (1855), 2 E. D. Smith (New York), 621, the court, by Judge Woodruff, applying this rule to the case of a mechanic's lien, where the lienor had taken a note for the amount of the debt and transferred it to a third person, in an action to foreclose the lien, *i. e.*, on the original debt, he produced the note to be cancelled, but the court held that in such a case possession of the note was not enough. The transferee might have got a judg- ment on the note while it was in his possession, which he

could still enforce. The plaintiff must prove payment to the transferee. Here is Judge Woodruff's language (p. 632):

"The case would stand thus: The plaintiff furnished to "the contractor work and materials, and received there- "for such contractor's negotiable note. *By this, it is "true, the debt is not paid;* the only effect is to suspend "the right of action until the note comes to maturity. "But the plaintiff transfers the note to a third person; *by "that transfer he loses his right of action;* the title is "now vested in a third person, who *alone*, while all things "remain in that condition, is entitled to the money due. "Upon that title such third person recovers a judgment "against the contractor; by that judgment the right of "action, before vested in such third person, is merged, "and *that* right of action cannot be transferred to the "plaintiff by delivery of the note. It is true that, if the "plaintiff pays the debt to such third person and takes "up the note in discharge of his own liability as endorser, "*he has his resort to the maker for the original consider- "ation* or for money paid to his use, and he may perhaps "proceed on the note itself, but he must, before he can "avoid the legal effect of his own transfer of the right of "action, and the recovery of a judgment by a third per- "son thereon, show that he has become reinvested with a "title to the unpaid debt in such a manner that if the "maker of the note pay him the money it will operate to "discharge him from a liability to pay the same amount "again on such judgment. The possession and produc- "tion of the note does not prove this, for the possession "of the note ceased to be material to the third person for "the purpose of enforcing his claim against the maker "the moment he recovered judgment thereon; and, there- "fore, no presumption that the plaintiff had paid the "amount to such third person in discharge of the maker's

"liability, arises from the fact that the plaintiff after-
"wards obtained possession of the notes."

The same was held by the Court in *Looney* vs. *Dist. of Columbia*, 113 U. S., 258.

Now there is not any proof that any of these notes was taken in payment of the debt by special agreement—and as we have got a judgment and it is for them to show that it is wrong absence of proof settles the matter to the contrary. It is established then that none of the notes was taken, by special agreement, in payment.

And it follows that if there were a succession of twenty notes given for the same debt, if Mr. Dooley had assigned the middle one, it would have suspended his right of action on all the others and the original debt also, and would have been a good assignment of the debt.

Does it make any difference that one of the notes was put through the books? We submit not. Of course if the original note had been surrendered that would have been different, but then Mr. Dooley would not have had it to assign.

"As a general rule, anything written, said, or done in
"pursuance of an agreement, and for valuable considera-
"tion, or in consideration of some pre-existing debt, to
"place a money right or fund out of the original owner's
"control, and to appropriate in favor of another person
"amounts to an equitable assignment. Hence no writing
"or particular form of words is necessary, provided only
"a consideration be proved, and the intention of the par-
"ties made apparent by suitable evidence."

"No particular form of assignment is at the present
"day requisite; since the only indispensable thing upon
"which equity has insisted is that the assignor intended
"to transfer and the assignee to accept the transfer."

Schouler's Personal Property, § 77.

Mr. Dooley testified that he *intended* to transfer *the actual debt*, and added:

"Q. When you afterwards discovered in your posses-
" sion notes which it might be claimed were renewals of
" some or any of those notes, did you send or give them
" to Mr. Paige, with directions to deliver to Mr. Pangburn?
" A. I did" (R. p. 149).

IV.

The Attachments.

The Court of Appeals has reversed the decree as to forty-five cases of the silk because

1. Mr. Dooley had them in his possession in New York on the 21st May—and until the 25th May.

2. On the 21st May the complainants got an attachment and delivered it to the sheriff—but the sheriff made no levy—*perhaps*, because he demanded bond of indemnity and the bond was not ready until after the 25th May; *perhaps*, because he did not find the silk or did not know of it. At any rate he did NOT *levy*.

3. Mr. Dooley knew the attachment was out.

4. *Knowing the attachment was out he moved the silk to Brooklyn and attached it himself.*

The complainants afterwards attached it in Brooklyn. And the court has for this reason held that Mr. Pangburn's attachment should be postponed to that of the complainants.

The judges give different reasons for this.

JUDGE WALLACE (R. p. 717):

"Of these goods forty-five boxes were removed by

" Dooley (the receiver of the Willimantic bank) and stored
" in Brooklyn clandestinely for the purpose of defeating
" a levy upon them under the attachment in the complain-
" ants' action until Dooley could procure an attachment
" and levy upon them through the instrumentality of
" Pangburn. A creditor having property of a debtor in
" his possession or under his control cannot thus defeat
" the rights of another creditor who has been in the mean-
" time using proper diligence to attach it. A race of dili-
" gence between creditors is legitimate, but it cannot be
" won by the abuse of legal remedies. I cannot doubt *that*
" *the complainants could recover of Dooley in an action on*
" *the case for his acts in frustrating their attempted levy.*
" A court of equity under such circumstances should post-
" pone his lien to theirs."

JUDGE SHIPMAN (R. p. 716):

"The 107 cases which were originally in the care of
" Thompson in Greene St., as the bank's goods, went to
" Brooklyn, although the exact number which went there
" on May 25 is not clearly stated in the record. While
" creditors were inquiring with a sheriff at Greene St. in
" regard to these goods, for the purpose of attachment,
" they were removed from place to place by the order of
" Dooley's counsel, were stored in his name and were at-
" tached in the suit of the bank against the silk company
" by its direction. The attempted attachment by the com-
" plainants of the forty-five cases in Greene St. was pre-
" vented by their removal to Brooklyn. The counsel for
" Dooley distrusted the validity of the bills of sale
" and desired to secure the bank by the aid of
" legal proceedings. The receiver of the bank had an
" equal right with other creditors to take legal steps to
" secure its debt, but had no right to take *unfair* steps.
" The removal of the forty-five cases to Brooklyn and the

" storage of the property in the name of Mr. Paige so that " it could be in a measure secreted for the purpose of pre- " venting the complainants from completing their attach- " ment of these cases, was an *unfair* step. Hadden & " Co. first appeared as attaching creditors on May 21. At " this time sixty-two boxes had been attached in the " Dooley suit, and forty-five were in Greene St. The re- " moval of these boxes after May 21 to prevent the com- " pletion of the Hadden & Co. attachment was an *unfair* " advantage in this race between creditors, and compels a " court of equity to declare that the complainants should " have a prior lien upon the cases which were in Greene " St. when the sheriff's bond was being prepared."

Text of the New York Attachment Statute.

Code Civil Procedure, Section 635:

" A warrant of attachment against the property of one " or more defendants may be granted upon the application " of the plaintiff," etc.

Section 641:

" It must require the sheriff to attach and to safely keep, " so much of the property, within his county, which the " defendant has, or which he may have, at any time before " final judgment in the action, as will satisfy the plain- " tiff's demand, with costs and expenses."

SECTION 644. " The sheriff must immediately execute " the warrant by levying upon so much of the personal " and real property of the defendant, within his county, " not exempt from execution, as will satisfy the plaintiff's " demand, with the costs and expenses. He must take " into his custody all books of account, vouchers, and

" other papers, relating to the personal property attached,
" and all evidences of the defendant's title to the real
" property attached, which he must safely keep, to be
" disposed of as prescribed in this title."

SECTION 649. A levy under a warrant of attachment " must be made as follows: "

* * * * * * *

" 2. Upon the personal property, capable of manual de-
" livery, including a bond, a promissory note, or other
" instrument for the payment of money, by taking the
" same into the sheriff's actual custody. He must there-
" upon, without delay, deliver to the person from whose
" possession the property is taken, if any, a copy of the
" warrant, and of the affidavits upon which it was
" granted."

SECTION 674. "The sheriff must keep the property "attached by him, or the proceeds of the property sold "or of a demand collected by him, to answer any judg-"ment that may be obtained against the defendant in the "action."

SECTION 682. "The defendant, or a person who has "acquired a lien upon or interest in, his property, after "it was attached, may, at any time before the actual ap-"plication of the attached property, or the proceeds "thereof, to the payment of a judgment recovered in the "action, apply to vacate or modify the warrant, or to in-"crease the security, given by the plaintiff, or for one or "more of those forms of relief, together or in the alterna-"tive."

SECTION 708. "Where an execution against property "is issued upon a judgment for the plaintiff in an action "in which a warrant of attachment has been levied the "sheriff must satisfy it as follows:

* * * * *

3. "If personal property attached belonging to the

"defendant, has passed out of the hands of the sheriff, "without having been sold or converted into money, and "the attachment has not been discharged, as to that prop- "erty he must, if practicable, regain possession thereof; "and for that purpose he has all the authority which he "had to seize the same under the warrant. A person who "wilfully conceals or withholds such property from him, "is liable to double damages, at the suit of the party "aggrieved."

1. It thus appears that no right comes to any one by the *issuing* of any attachment, and none until a *levy* is made.

Rodgers *vs.* Bonner, 45 N. Y., 379, 382.
Lynch *vs.* Crary, 52 N. Y., 181, 182.
Tim vs. *Smith*, 93 N. Y., 87.
Scott *vs.* Morgan, 94 N. Y., 508.
Learned *vs.* Vandenburgh, 7 How. Pr., 379; 8 How. Pr., 77.
Marsh *vs.* Lawrence, 4 Cow., 461.

The first two cases hold this expressly.

In *Tim* vs. *Smith* (93 N. Y., 87), an application, to set aside an attachment was made under the section 682—given above—by a creditor who had got out an attachment subsequent to the one sought to be set aside.

The court held, that since it did *not* appear *that a valid levy* upon the same property had been made under the plaintiff's attachment, it did not appear that he had "acquired a lien upon or interest in" the property, and therefore could not maintain the application.

In *Scott* vs. *Morgan* (94 N. Y., 508) the Court held that

an action against a person who "willfully conceals or "withholds" property which has already been attached by the sheriff could not have been maintained by the attaching creditor, but for the statute (section 708 above)—quotting *Thurber* v. *Black* (50 N. Y., 85) to the proposition that: "It is only through the statute that a creditor can "directly enforce the application of his debtor's property, "to the payment of a judgment and execution, and for that "purpose he can employ only those methods which are "provided by the statute."

Learned vs. *Vandenburgh*, was a case where the sheriff having *two* attachments in his hands, levied under the *junior* one, and the court held the levy good as against the *elder* one. The exact facts being these: Two attachments came into the sheriff's hands. He returned under the *elder* attachment that he had levied upon "all the personal property of the defendant and "only personal property" (7 How. Pr. 379). He returned under the *junior* attachment, that he had levied upon "all the *real* and personal property of the defend-"ant" (7 How. Pr. 379), and the court held that the junior attachment took the real estate in preference of the elder attachment.

March v. *Lawrence* (4 Cow. 461) adjudged a question between a sheriff and a constable. The sheriff had the first execution. The constable levied first. The constable held the property.

We submit, therefore, that no action could have been maintained by the complainants against Mr. Dooley, either on the case or otherwise, and that Judge Wallace's reasoning fails.

2. *As for the* UNFAIRNESS *of the proceeding:*

Levies under attachments, like other service of process, are set aside when they have been effected by means of an UNLAWFUL *act or by* FALSE *representations or other* FRAUD. *In the latter case it can only be set aside by the person who was deceived by the representations. In the former case it can, I suppose, be set aside by anybody who has any interest in the property.*

In this case there was nothing done that was unlawful; there was no deceit of any kind—no false fact was stated—no contract was broken—no duty was violated or omitted *unless* it be a duty to find out among all the two thousand millions of human beings upon the earth some one who is also in a position to get an attachment, *notwithstanding that you have never heard of him*, and tell him that you have the property, *so that he may attach it before you.* What was done in this case was, instead of bringing the Sheriff to the property, *to take the property to the Sheriff*, and we succeeded in getting there before anybody else succeeded in attaching it. That is all.

Mr. Dooley was rightfully in the possession. When he was appointed receiver he found the silk in the possession of the bank, and it had got rightfully into the possession of the bank, by the active act of the general manager and a majority of the stockholders, and with the knowledge of, and no dissent from all the directors of the Natchaug Company. What is more, he had the right to suppose that he owned it. Mr. Perkins and Mr. Solomon Lucas, we are told, stand pretty well in Connecticut, and the Court of Appeals itself a year afterwards, expressed its opionion to the same effect (*Post*, Appendix, p. 3).

So that at any rate his possession was lawful, and it follows that he had the right to keep it where it to him seemed fit—in Brooklyn as well as in New York.

What was his duty, as a public officer, to his creditors?

Was it to let the other creditors of the Natchaug Company take it from *his* creditors, or was it to use a part of his three hundred and fifty thousand dollars of debt to protect it?

And before doing so was he bound to inform all of the two thousand millions of human beings that he was going to attach the silk—before he did so—and was he bound to set a watch upon every one of the hundred judicial officers who in New York can make attachments, to find out if any one of them had signed one, and all of the sixty sheriffs, to find if one of them had received one?

A charge of unfairness it is impossible to argue about.

Why should not we claim that because our debt was due first, and we could have sued first, it was *unfair* for the complainants to sue before we did when they knew that we could sue.

What is usually understood and stated in the books to be the rule on this subject is as follows:

"The right of attaching creditors who, as against their "common debtor, have equal claims to satisfaction of their "debts, must depend upon strict law; and if one loses a "priority once acquired, by any want of regularity or "legal diligence in his proceedings, it is a case where no "equitable principles can afford him relief; it is a case "where the equities are equal, and the right must be "governed by the rule of law." *Suydam* v. *Huggeford*, 23 Pick., 465, 472; Drake, § 221.

III.—In the mind of the Court of Appeals this matter evidently turned upon the fact that Mr. Dooley knew

that the complainant's attachment was in the sheriff's hands.

To this we have to say that it is impossible *now* to tell whether that was so or not—because the proofs were not taken in that view. It was not in the mind of either counsel. It was not only not pleaded, but the bill was amended after all the proofs were in leaving out what little allegation of fact there had been about it in the original complaint—and the question was never raised by the three counsel for the complainants in *ten* arguments of the merits (*ante*, pp. 86–89).

The deputy sheriff plainly cannot remember when he served this particular attachment (*ante*, pp. 83, 84–5).

Mr. Drake, in his work on attachments says (§ 193): "An attachment levy effected by *unlawful* or *fraudulent* "means is illegal and void."

The cases which he cites and the cases which cite those cases are as follows:

The Sheriff broke into a dwelling-house—which was *unlawful* and illegal.

Itsley *vs.* Nichols, 12 Pick., 270.
People *vs.* Hubbard, 27 W. R., 370.
Curtis *vs.* Hubbard, 4 Hill, 437.

"As a general rule no person can acquire the right to "the custody of the person or the property of another by "his own *illegal* act." Per Walworth, Chancellor, 4 Hill, 439.

Parsons *vs.* Dickinson, 11 Pick., 353—Dickinson, on a Sunday, without any right whatever, took the debtor's property from the latter's shed; kept it until Monday

and then attached it. It was held that the taking was a trespass and *illegal*.

Powell *v.* McKee, 4 La. Ann., 109, the possession of the property was obtained by *fraud*.

So in Paradise *v.* Farmers' Bank, 3 La. Ann., 710.

So Myers *v.* Myers, 8 La. Ann., 369.

In Timmons *v.* Garrison, 4 Humph., 148, the creditor decoyed a slave from Georgia into Tennessee and there attached him. A trespass.

In Nason v. Esten, 2 R. I., 337, the officer watched the defendant at work in his field until the plaintiff's agent had "fraudulently" (p. 340) enticed the defendant out of the State, and then the officer attached his real estate.

In Metcalf *v.* Clark, 41 Barb., 45, the defendant was enticed from Canada into New York by *false* representations. The service of a summons in New York was set aside.

In Gilbert *v.* Hollinger, 14 La. Ann., 445, the negroes were brought into the jurisdiction by what the court held to be a trespass.

Pomeroy *v.* Parmlee, 9 Iowa, 140, the sheriff took property out of his bailiwick, *falsely* representing that he seized under a writ of attachment, and took it into his own county and there attached it. Of course the original seizure was an *illegal* act.

In Deyo *v.* Jennison, 10 Allen, 410, the debtor was induced by "*fraudulent* misrepresentations" of Jennison to bring property into Massachusetts, where Jennison immediately attached it, being in waiting for the purpose.

In Chubbuck *v.* Cleveland, 37 Minn., 466, the defendant was induced to come into the jurisdiction "with his team "by the *deceit* and *false* representations of Kelly, and with "the purpose and object of effecting such levy" (p. 467).

In Classon *v.* Morrison, 37 N. H. 482, Ford had Classon arrested for larceny, and while in custody the sheriff searched him and took from him, by *force*, certain monies, which he (the sheriff) kept until the next day when he attached them at the suit of Ford. The court held that the taking of the money was *unlawful*.

IV.

Risley's connection with the false reports.

The reports purport to be of the Natchaug Company, and Risley's connection was not known and certainly not relied upon.

And if he had signed the name of the bank to it, it would not have bound the bank, because—

1. He was not acting for the bank, but for himself.

2. Even if Risley had made the representations in the name of the bank, they would not have been the acts or representations of the bank; because beyond his power.

In AMERICAN SURETY COMPANY *vs.* PAULY, 170 U. S., 133, 149,

The Court, speaking by Mr. Justice Harlan, said (p. 149):

"In its charge to the jury the trial court called atten-
"tion to another defence made by the company, namely,
"that the bond was void by reason of fraudulent misrep-
"resentations and concealments of Collins acting as the
"president of the bank. The court said: 'It is said
"'that this bond of indemnity was obtained upon an
"'application which was certified to by the bank itself,

" ' and that in the application facts were misrepresented
" ' and facts were concealed with fraudulent intent on the
" ' part of the bank; therefore that the bond is void. The
" ' application was accompanied by a certificate of Collins,
" ' president of the bank. The only knowledge of any
" ' facts which ought to have been communicated, or were
" ' misrepresented, the only knowledge which the bank
" ' possessed at the time application was made, was the
" ' knowledge of Collins himself. Ordinarily a corpora-
" ' tion, like any other principal, is chargeable with the
" ' knowledge of any facts which are known to its agents:
" ' but in this case all the transactions, if there were any
" ' transactions of a fraudulent and dishonest character
" ' on the part of the cashier, were transactions for the
" ' benefit of Collins, and he was a participator in the
" ' fraud, and under those circumstances the law does not
" ' infer that the agent or officer will communicate the
" ' fact to his principal, the corporation, and under such
" ' circumstances the corporation is not bound by his
" ' knowledge. So this defense melts away and there is
" ' nothing of it whatever.'

" The Company insists that in obtaining the bond in
" suit Collins acted for the bank, and as a corporation can
" only speak by agents, the bank is responsible for any
" false or fraudulent statements in the certificate given by
" Collins to the Surety Company, and which he signed as
" president of the bank.

" In support of its contention the company cites Frank-
" lin Bank *v.* Cooper, 36 Maine, 179, 197; Graves *v.*
" Lebanon Nat. Bank, 10 Bush, 23, 29; Veazie *v.* Will-
" iams, 8 How., 134, 156; Bennett *v.* Judson, 21 N. Y.,
" 239; Nat. Life Ins. Co. *v.* Minch, 53 N. Y., 144, 149;
" Holden *v.* N. Y. & Erie Bank, 72 N. Y., 286, 292;
" Elwell *v.* Chamberlin, 31 N. Y., 611, 619. What were
" those cases?

* * * * * * *

"Without stopping to consider whether each of the "above cases was correctly decided, it may be observed "that those relating to sureties in bonds given to corpora- "tions arose directly between the sureties and corpora- "tions represented by their *boards of directors or by some "of their officers acting within the authority conferred "upon them;* and that those relating to the liability of "principal by reason of the acts or representations of his "agent, arose out of the agent's acts or declaration *in the "course of the business entrusted to him.*

"None of the cases cited embrace the present one. In "the first place, the procuring of a bond for O'Brien, in "order that he might become qualified to act as cashier, "was no part of the business of the bank nor within the "scope of any duty imposed upon Collins as president of "the bank. It was the business of O'Brien to obtain and "present an acceptable bond. And it was for the bank, "by its constituted authorities to accept or reject the "bond so presented. The bank did not authorize Collins "to give, nor was it aware that he gave, nor was he en- "titled by virtue of his office as president to sign, any "certificate as to the efficiency, fidelity or integrity of "O'Brien. No relations existed between the bank and "the Surety Company until O'Brien presented to the "former the bond in suit. What therefore Collins as- "sumed in his capacity as president to certify as to "O'Brien's fidelity or integrity, was not in the course of "the business of the bank nor within any authority he "possessed. He could not create such authority by "simply assuming to have it. The Circuit Court of Ap- "peals, speaking by Judge Lacombe, well said that there "were many acts which the president of a bank may do "without express authority of the board of directors in "some cases because the usage of the particular bank im- "pliedly authorized them, in other cases because such

" acts were fairly within the ordinary routine of his busi-
" ness as president; but that the making of a statement,
" as to the honesty or fidelity of an employe for the benefit
" of the employe, and to enable the latter to obtain a bond
" insuring his fidelity, was no part of the ordinary routine
" business of a bank president, and there was nothing to
" show that by any usage of this particular bank such
" function was committed to its president.

" It must therefore be taken, as between the bank and
" the company that the former cannot be deemed merely
" by reason of Collins' relation to it, to have had con-
" structive notice that he as president gave the certificate
" in question.

" The presumption that the agent informed his prin-
" cipal of that which his duty and the interests of his
" principal required him to communicate, does not arise
" where the agent acts or makes representations not in
" execution of any duty that he owes to the principal, nor
" within any authority possessed by him, but to subserve
" simply his own personal ends or to commit some fraud
" against the principal. In such cases the principal is
" not bound by the acts or declarations of the agent unless
" it be proved that he had at the time actual notice of
" them, or having received notice of them failed to dis-
" avow what was assumed to be said and done in his be-
" half. * * *" Citing and commenting on cases (from pages 157 to 159 inclusive).

(Page 159):

" Further citation of authorities would seem to me un-
" necessary to support the proposition that if Collins gave
" the certificate that he might, with the aid of O'Brien as
" cashier, carry out his purpose to defraud the bank for
" his personal benefit, the law will not presume that he
" communicated to the bank what he had done in order
" to promote the scheme devised in hostility to its inter-

"ests. In our judgment the Circuit Court of Appeals "correctly held that the plaintiff's right of action on the "bond was not lost because its president, Collins, made "to the defendants false representations as to the cashier's "honesty, and that when two officers of a corporation have "entered into a scheme to purloin its money for the benefit "of one of them 'in pursuance of which scheme it be- "'comes necessary to make false representations to a "'third person ostensibly for the bank, but in reality to "'consummate such scheme and for the benefit of the "'conspirators, and not in the line of ordinary routine "'business of such officers and without express authority, "'the corporation being ignorant of the fraud, the officers "'are not in thus consummating such theft the agents of "'the corporation.'"

As to the powers of a vice-president and executive officer. Western National Bank *vs.* Armstrong, 152 U. S., 346.

The Court, speaking by Mr. Justice Shiras said (p. 350): "There is no evidence whatever that the board of direc- "tors of the Fidelity Bank gave any authority to Harper "to borrow money on behalf of the bank, much less to "borrow so enormous a sum on so long a time. In this "respect the complainant's case stands barely on the "assertion in the bill that 'Harper was the vice-president "'and general manager of the Fidelity National Bank, "'with full authority to make said loan on its behalf.' "The only evidence we find in the record to support such "averment is found in the answer by J. Harvey Waters, "the general book-keeper of the Fidelity National Bank, "on cross-examination wherein he stated that E. L. "Harper was the vice-president and managing officer, and "that by 'managing officer' he meant that Harper was "the 'general manager of the business of the bank.' No "such office as that of 'general manager' is known or

"named in the National Bank Acts, nor does any such "office exist by usage. The most that can be claimed in "this case is that Harper acted as the principal executive "officer of the bank. It cannot be pretended that, as "such, he had power without authority from the board, "to bind the bank by borrowing $200,000 at four months "time.

"It might even be questioned whether such a transac- "tion would be within the power of the board of directors. "The powers expressly granted are stated in the eighth "section of the National Bank Act (Rev. Stat., Sec. 5136, "Par. 7): A national bank can 'exercise by its board of "'directors, or duly authorized officers or agents, subject "'to law, all such incidental powers as shall be necessary "'to carry on the business of banking, by discounting "'and negotiating promissory notes, drafts, bills of ex- "'change and other evidences of debt; by receiving "'deposits; by buying and selling exchange, coin and "'bullion; by loaning money on personal security; and "'by obtaining, issuing and circulating notes.'

"The power to borrow money or to give notes, is not "expressly given by the act. The business of the bank "is to lend, not to borrow, money; to discount notes of "others, not to get its own notes discounted. Still as was "said by this court, in the case of First Nat. Bank *vs.* "Nat. Exchange Bank, 92 U. S., 122, 127: 'Authority is "'thus given in the act to transact such a banking business "'as is specified, and all incidental powers necessary to "'carry it on are granted. These powers are such as are "'required to meet all the legitimate demands of the "'authorized business, and to enable a bank to conduct "'its affairs within the general scope of its charter, safely "'and prudently. This necessarily implies the right of "'a bank to incur liabilities in the regular course of

"'its business as well as to become the creditor of "'others.'

"Nor do we doubt that a bank, in certain circum- "stances, may become a temporary borrower of money. "Yet such transactions would be so much out of the "course of ordinary and legitimate banking as to require "those making the loan to see to it that the officer or "agent acting for the bank had special authority to bor- "row money. Even, therefore, if it be conceded that it "was within the power of the board of directors of the "Fidelity National Bank to borrow $200,000, on time, it "is yet obvious that the vice-president, however general "his powers, could not exercise such a power unless "specially authorized so to do, and it is equally obvious "that persons dealing with the bank are presumed to "know the extent of the general powers of the officers.

"Without pursuing this part of the subject further we "think it evident that Harper had no authority to borrow "this money, and that the bank cannot be held for his "engagements, even if made in made in behalf of the "bank, unless ratification on the part of the bank be "shown."

AS TO A CASHIER.

In United States v. City Bank of Columbus, 21 How. 356, Moodie, the cashier of the defendant, had signed, as cashier, a writing to the Secretary of Treasury in regard to one Miner, which contained these words: "He is also "authorized, if consistent with the rules of the Treasury "Department, to contract on behalf of this institution "the transfer of money from the East to the South or "West, for the government" (p. 360).

Under this authority Miner made, on the part of the bank, with the Secretary of the Treasury a contract to transfer one hundred thousand dollars to New Orleans, and the money never got there.

On a suit against the Bank, the trial court charged the jury as follows (p. 363):

"That if they should find that the letters written by "Moodie was his own act, and had been given without "the knowledge or authority of the board of directors, "or of any of them individually, except Miner, and that "the agency of Miner was not constituted by or known "to the board of directors, or the directors individually, "or any of them, except Miner, but was the act of the "cashier alone; and if they should find that Moodie had "no power as cashier, except such as belonged to the "office of cashier generally, or such as are given by the "charter or by the by-laws or other law or usage of the "said bank, that the defendant was not concluded by that "letter, and is not bound by the contract made by Miner, "without some subsequent ratification of the same, "though the secretary had, in contracting with Miner, re-"lied upon it as the act of the bank."

The Court, speaking by Mr. Justice Wayne, said (p. 363):

"It"—the above charge—"is all that the litigants "could have expected, and is liberal to both. It is also in "coincidence with the views generally entertained of the "powers and duties of the cashiers of banks, and per-"fectly so with such as have been expressed by this court "in previous reported cases. In Fleckner *v.* Bank of the "United States (8 Wheat. 338, 356, 357,) this court said, "the charter authorizes the president and directors to ap-"point a cashier and other officers of the bank, and gives "the president and directors, or a majority of them, full "power and authority to make all such rules and regula-"tions for the government of the affairs and conducting "the business of said bank as shall not be contrary to the "act of incorporation. It contains no regulations as to

"the duties of cashiers; with the directors it would rest "to fix the duties of cashier or other officers, whether they "have made any regulation upon this subject does not "appear, but the acts of the cashier, done in the ordinary "course of the business, actually confided to such an "officer, may well be deemed *prima facie* evidence that "they fell within the scope of his duty. In the case, Bank "of the United States *v.* Dunn (6 Peters, 51), the court "would not permit the president and cashier of the bank "to bind it by their agreement with the endorser of a "promissory note that he should not be liable on his en- "dorsement. It said it is not the duty of the cashier and "president to make such contracts, nor have they power "to bind the bank, except in discharge of their ordinary "duties. All discounts are made under the authority of "the directors, and it is for them to fix any conditions "which they may think proper in loaning money. The "court defines the cashier of the bank to be an executive "officer, by whom its debts are received and paid, and its "securities taken and transferred, and that his acts, to be "binding upon a bank, must be done within the ordinary "course of his duties. His ordinary duties are to keep "all the funds of the bank, its notes, bills and other "choses in action, to be used from time to time for the "ordinary and extraordinary exigencies of the bank. He "usually receives directly, or through the subordinate "officers of the bank, all moneys and notes of the bank, "delivers up all discounted notes and other securities "when they have been paid, draws checks to withdraw "the funds of the bank where they have been deposited, "and, as the executive officer of the bank, transacts most "of its business.

"The term ordinary business, with direct reference to "the duties of cashiers of banks, occurs frequently in "English cases, and in the reports of the decisions of our

" State courts, and in no one of them has it been judicially
" allowed to comprehend a contract made by a cashier
" without an express delegation of power from a board of
" directors to do so, which involves the payment of money,
" unless it be such as has been loaned in the usual and
" customary way, nor has it even been decided that the
" cashier could purchase or sell the property, or create an
" agency of any kind for a bank which he had been au-
" thorised to make by those to whom has been confided
" the power to manage its business, both ordinary and
" extraordinary. The case of Kirk *v.* Bell, (12 English
" and Common Law Reports, 389), and that of Hoyt *v.*
" Thompson, were very appropriately cited by the coun-
" sel of the appellee, in this connection; and we think
" the safe rule in all instances of acts done by the offi-
" cers of corporate companies, or by those who have the
" management of their business, from which contracts
" are alleged to have been made, is, to test that fact by
" an inquiry into the corporate ability which has been
" given to them, and to their subordinate officers, or which
" the directors of the company can confer upon the latter
" to act for them. Such was the view of this court
" when it decided, in the case of the Bank of the United
" States *v.* Dunn (6 Peters), that a release given by its
" president and cashier to the endorser of a promissory
" note of his liabilty upon it, did not bind the bank,
" neither nor both having any authority to make con-
" tracts of that kind. The case before us is one in
" which a cashier acts alone, and in which he testifies that
" he did so without any consultation with the president
" or directors of the company, and of which they had no
" information from him of the transaction until after the
" failure of Miner to pay the money in New Orleans.
" The act under which the City Bank of Columbus became
" a corporation does not, in any part of it, give any power

"to a cashier to act independently of the directors. No "specific power is given to the directors to appoint a "cashier. In the general power given to the directors to "appoint officers to do the ordinary business of the "bank, they have an authority to appoint a cashier, "and such an appointment is a limitation of that officer's "executive function in doing the business of the bank. It "cannot be pretended that the directors, as a whole, or "any one of them, except Miner, consented to the "cashier's designation of Miner for any such purpose "as was concluded between them, to induce the Secre- "tary to believe that Miner was the agent of the bank, "either to buy stock of the United States or to enter "into contracts for the transmission of money, free of "charge, to those posts where the United States should "designate it to be put. Such a power in the Secretary "of the Treasury is a necessary one for the transaction "of the business of the Government, pervading, as it "does, every part of the country. The exercise of it, how- "ever, requires great care and caution in the selection of "agents for such a purpose, and no authority short of the "most certain should be taken to establish the represen- "tative character of any one for a private company or "corporation to enter into such a contract with the "Secretary."

The decree of the Circuit Court of Appeals should be reversed and that of the Circuit Court affirmed.

EDWARD WINSLOW PAIGE,
Of Counsel.

APPENDIX I. (*Opinion Circuit Court of Appeals—Second Circuit.*

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

12 May, 1896.

74 Fed. Rep. 429.
38 U. S. App. 651.
20 C. C. A. 494.

HAROLD S. HADDEN *et al.*

vs.

MICHAEL F. DOOLEY, Receiver, *et al.*

SHIPMAN, *C. J.*

This is an appeal from an order of the Circuit Court of the United States for the Southern District of New York, dated December 12, 1895, which denied a motion to dissolve an injunction *pendente lite*, and continued it until the further order of the Court.

The original order restrained, *pendente lite*, the Sheriff of Kings County from selling the property of the Natchaug Silk Company in his possession as Sheriff upon executions against said company in favor of John A. Pangburn or Michael F. Dooley, as Receiver, and restrained Pangburn and Dooley from further proceedings at law against the property of said Silk Company in the State of New York.

An outline of the facts is as follows:

On April 23, 1895, the Natchaug Silk Company, a Connecticut corporation, hereinafter called the Silk Company, owed the First National Bank of Willimantic, a national banking association, hereinafter called the bank, located in Connecticut, over $300,000, and was entirely insolvent. In consequence of this indebtedness, the bank suspended and Michael F. Dooley was appointed its Receiver on April 26, 1895, by the Comptroller of the Currency. On April 23, 1895, J. D. Chaffee, as president and general manager of the Silk Company, in consideration of and to reduce this indebtedness, sold to the bank 107 cases of manufactured silk, the value of which cannot be accurately ascertained from the affidavits, but which is said to be about $20,000. They were then or had been shipped to New York City, where they were subsequently taken by Dooley into his possession and removed to Brooklyn. On May 8, 1895, he, as Receiver, attached the goods by an attachment which was subsequently dissolved. On May 30, 1895, he sold and assigned to Pangburn, who is a resident of the State of New York, notes of the Silk Company, not paid by this transfer, amounting to about $67,000, for the nominal consideration of $200, which sale Dooley made by virtue of an order of the Circuit Court of the Southern District of New York, with the approval of the Comptroller of the Currency, for the purpose of enabling a suit to be brought in the State of New York, by a resident of that State, in his own name, against the Silk Company, a foreign corporation. Pangburn did bring suit on said notes against the Silk Company on June 1, 1895, in the proper State Court, obtained judgment for the full amount thereof and an execution which was levied by the Sheriff of Kings County

upon these cases of silk. The sale was stopped by this injunction order.

On June 6, 1895, the complainants, who are creditors of the Silk Company to the amount of about $22,000, brought suit against it, in a court of the State of New York, and obtained an order of attachment, under which the Sheriff of Kings County levied an attachment upon the same silk.

On July 2, 1895, the complainants brought a bill in equity, upon which the injunction order now in question was issued against Dooley, Pangburn, the Silk Company and others, alleging that all their acts in connection with the silk were fraudulent, and praying for relief by injunction and otherwise.

It thus appears that the bank and the complainants are creditors of the Silk Company, and that Dooley, as Receiver of the bank, and the complainants are each striving to obtain a firm hold upon the silk as a means of payment for their respective debts.

The complainants present questions of law or of fact at each step of the bank's proceedings. Two of them are of a character which cannot be determined upon the affidavits.

The first is that Chaffee, as president and general manager of the Silk Company, which was in fact and must have been known by him to be insolvent, had no authority to sell a large portion of the personal property of the company to one of its creditors in part payment of its debt. The decisions of the State of Connecticut apparently recognize that a president and unlimited general manager of its manufacturing corporations, is vested with such power and that such a transfer of personal property is valid, but the complainants assert that by the general

commercial law a general manager of a private corporation is not clothed with this power.

The second is that the notes which were sold to Pangburn had been paid by the Silk Company by renewals which were not sold to him. The answer to the first question, which, as presented, is one of law, may be controlled by the facts which may subsequently appear as to any limitation of Chaffee's actual powers of which the bank had knowledge.

The second question is purely one of fact, and while the affidavits of Angelo, which the complainants present, are, of themselves, insufficient to satisfy the mind as to the actual character of the transactions in regard to the notes, the question is one which deserves examination.

It is obvious that a court of appeals cannot settle questions of law which may depend upon undisclosed facts, or questions of fact, upon *ex parte* affidavits of the character which were presented to the Circuit Court upon the motions in this case. It is also true that when the questions which naturally arise upon the transactions make them a proper subject for deliberate examination, if a stay of proceedings will not result in too great injury to the defendants, it is proper "to preserve the existing state of things until the rights of the parties can be fairly and fully investigated and determined" by evidence and proofs which have the merit of accuracy. (Blount *vs.* Société Anonyme, 3 C. C. A., 455).

The questions in this case are of the character which has been indicated, but we have been impressed with the fact that a sale of the silk will be for the pecuniary advantage of all the parties. If the goods remain in boxes for months, their pecuniary value will be greatly endangered. It would seem that by the consent of the parties, the goods should be sold under the execution, after ample notice

and under circumstances which will ensure proper prices, and the proceeds should be placed in the registry of the Court, to await the final decision upon the merits, and for this purpose the Circuit Court is instructed that it has the power to modify the order.

The order continuing the injunction is affirmed, with costs of this Court, with instructions to the Circuit Court to modify the same upon application of the parties, as it may be advised.

EDWARD WINSDOW PAIGE, for the appellants.

H. K. TWOMBLY, for appellees.

Upon the motion to dissolve the injunction, made upon the full proofs, Judge Lacombe delivered the following opinion:

"U. S. CIRCUIT COURT,

"NORTHERN DISTRICT OF NEW YORK.

"December, 1896.

"HAROLD S. HADDEN and another

"*vs.*

"THE NATCHAUG SILK COMPANY.

"LACOMBE, Circuit Judge:

"Under the decision of the Court of Appeals only two "questions and two only are left open, viz: the sufficiency "of the assignment of title to the silk by Chaffee, and the "validity of the notes assigned to Pangburn as obligations "of the Natchaug Silk Co. Only the latter question need "be considered. The evidence is voluminous and in- "tricate, but it is reasonably certain that such of the notes "assigned to Pangburn as are referred to in the record as "Nos. 3, 4, 13 and 14, and which were found in the Bank, "were never renewed nor is there satisfactory proof of "payment, and plaintiffs have not proved that they passed "to the Bank without consideration. As to No. 5, the "evidence is not so clear; the probabilities are that it was "not renewed. Under the authorities moreover the de- "livery of a note for indebtedness evidenced by an old one "does not extinguish the indebtedness nor render the old "note void, unless the creditor by discounting it and "crediting the proceeds or in some other way, agree to

"accept it in payment. Inasmuch as not only the original "notes, but all the notes which the bill book of the Silk "Company indicates were prepared as renewals are found "in the bank, the inference is that no such agreement "was made; the original debt was therefore not extin- "guished and the legal holder of the original note can re- "cover upon it if by surrendering all the subsequent notes "which were delivered as evidences of such debt he pro- "tects the maker against loss. Such surrender is proffered "here and upon deposition of these notes in court, subject "to whatever disposition may be made of them in the "final decree, the preliminary injunction will be vacated. "The court has not overlooked the fact that it is doubtful "whether the bank itself could have established any "claim to No. 8 nor that No. 15 is not an obligation of "the Silk Company, but the value of the property at- "tached and which is affected by the existing injunction "is manifestly much less than the aggregate of the other "notes upon which Pangburn was apparently entitled to "recover.

"Nov. 27th, 1896.

"E. H. L."

Upon an application by the complainants for a rehearing of this motion Judge Lacombe delivered the following opinion:

"U. S. CIRCUIT COURT,

"SOUTHERN DISTRICT OF NEW YORK.

"26th January, 1897.

"HAROLD S. HADDEN and another

"*vs.*

"THE NATCHAUG SILK COMPANY
"& others.

"LACOMBE, Circuit Judge:

"The mistake which was made as to the value of the "goods attached, in no way affected the decision of this "motion, which held that the bank was entitled to recover "not only on the notes for which no renewals were found, "but also on those where the bill book showed renewals, "provided all the notes of the renewal series were filed. "Upon re-examination of the case I am still of the opinion "that it is for the plaintiffs to show failure of considera-"tion for the original notes and that the proof does not "do this. All the notes of each series, however, should "be filed. Notice should be given of the settlement of "the order so that counsel may advise the Court whether "this requirement is complied with."

"All the notes of each series" were accordingly filed and are discribed in the order dissolving the injunction, a copy of which is printed at the end of this brief *post*, p. 37.

Dooley vs. *Pease*, R. in number 97 (348 of October Term, 1899), p. 8, 79 Fed. Rep, 860, 1March, 1897.

The decision was made in an action brought under a bill of sale made by Chaffee of certain goods in Chicago—not under our bills of sale—but presumably like them.

"The right of the Silk Company in the ordinary course "of its affairs to make a preference in favor of the bank "need not be questioned; the right of Chaffee, as presi- "dent, and acting general manager of the Silk Company "to sell its stock of goods, or do anything in relation to "its ordinary business transactions during the time this "was a going concern, need not be disputed.

"The facts in this case show that Chaffee as president "and acting general manager, conscious that the Silk "Company was about to fail leaving a large number of "creditors unpaid, executed this bill of sale to effect a "preference in favor of the bank.

"I am of the opinion that neither the president nor "general manager had power, without authority of the "board of directors, to execute, under such circumstances "and for such a purpose, the bill of sale. The Silk Com- "pany was owned by its stockholders as represented by "the board of directors. The executive officers are in- "tended to carry on the usual concerns of the Company "as a going affair, but it is not to be presumed to be the "wish of the stockholders that such merely executive offi- "cers should, in case of insolvency, have the power to "determine what creditors were to be preferred and what "to be left out.

"On the whole case there may be a finding entered re- "citing the facts as above given, and also a general find- "ing in favor of the defendants."

The language of this opinion as reported in 79 Fed. Rep., 860, varies somewhat from the above, and is as follows:

"Grosscup, District Judge (orally): I have prepared a long finding of facts, "which I will not attempt to recapitulate. My conclusion in this case is due to "my holding a simple proposition of law, and I can probably state it by a very "short resumé of the facts. The complainant is the receiver of a national bank "that had a large claim of over $200,000 against a silk company in Connecticut. "The silk company itself was in financial difficulties, and was about to fail. The "president of the company, who was also its acting general manager, having been "elected to that place some two or three years before, and not having been re-"elected. but continuing to act, came to Baltimore, Chicago and New York, and "executed a bill of sale of their stock of goods in these cities, respectively, to the "receiver of the bank. He knew at the time that his silk company was on the "point of failing, that an application would soon be made for the appointment of "a receiver, and that it would go into the hands of a receiver. The circumstances "are such that this discloses a clear case of an attempt on the part of the presi-"dent and acting general manager of a company that is no longer to be a going "concern, but is already an insolvent concern. and is to become a defunct concern-"to execute a preference in favor of one of its creditors. I hold that, in the ab-"sence of special authority conferred upon the president or general manager for "that purpose, by the directors, he has no power to make any such preference. "The president and general manager has power to conduct the affairs of the com-"pany as a going concern, and do everything consistent with its affairs as a going "concern; but, when it comes to preferring creditors of a concern to be wound "up, the owners of the property are the stockholders, through their board of "directors; and they have not, by the mere election of a man to the presidency of "the company, authorized him to discriminate between their creditors. There "will therefore be, in addition to this special finding of facts, a general finding in "favor of the defendant, the sheriff who seized the goods under attachment "writs."

COURT OF APPEALS OF MARYLAND,

APRIL TERM, 1897.

86 Maryland, 210.

HAROLD F. HADDEN and JAMES E. S. HADDEN, trading as HADDEN & Co.,

vs.

CHARLES H. LINVILLE, Garnishee of THE NATCHAUG SILK COMPANY.

Judge PAGE delivered the opinion of the Court.

In this case an attachment was issued out of the Superior Court of Baltimore City, at the instance of the appellants, against the Natchaug Silk Company, a Connecticut corporation. It was laid in the hands of Charles H. Linville, garnishee, who has pleaded *non assumpsit* on behalf of the defendant, and *nulla bona* as to himself.

At the trial, the plaintiffs having first offered other evidence to establish their claim, introduced the garnishee himself, and proved by him that he has been the agent of the Silk Company in Baltimore; and as such, had in his possession on the 25th day of April, 1895, certain of his goods. That up to the 27th day of December, 1895, when the attachment was laid in his hands, he still retained the possession of the goods, or the proceeds of the sale thereof; and that he yet holds them exactly as he had before. On cross-examination, he testified that on the

26th of April, 1895, Mr. Chaffee, the President and General Manager of the Silk Company, told witness, that, "to recompense or to make good a claim which the bank had against the Company," the goods in his hands had been transferred to Mr. Dooley (who was the Receiver of the Bank, and also asked witness if he would continue to represent the bank or Mr. Dooley in the sale of the goods. This he consented to do, and thereupon received from Solomon Lucas, then present, as the attorney for Dooley, an authority in writing to so act. Subsequently, witness received letters from Dooley about the goods, a copy of one of which, recognizing Linville as his agent, is exhibited in the record. That under this authority, the witness, after the 26th of April, held the goods as agent of Dooley. To the admission of the evidence thus given on cross-examination, the plaintiffs objected, on the ground that the conversation between Chaffee and the witness was hearsay, immaterial, and particularly because it was not shown that Lucas had any authority at that time to represent Dooley. As to the last objection, we think it clear that Dooley, by his letter of 12th July, recognized the authority of Lucas and ratified his act. The witness having testified that on the 25th of April he had in his possession goods of the Silk Company, and that he still held "these same" goods, it was entirely proper to interrogate him on cross-examination how, and for whom he held them, after that date. Such facts were germane to, and connected with, the main issue, which was, to whom the goods belonged at the time the attachment was laid in the garnishee's hands. Griffith *vs.* Diffenderfer, 50 Md., 479. There were present on the occasion referred to by witness the President and General Manager of the Silk Company, the representative of the Receiver of the Bank, and the person who had actual possession of the goods

as agent of the Silk Company. The General Manager directs the agent that the goods had been transferred, and inquires if he will continue to hold them as agent of the Receiver; the agent consents to do so, and receives the authority to so hold them from the attorney of Dooley. Now, if it be assumed there has already been a contract for the sale of the goods by the proper authorities, or if Chaffee had power to transfer them, the effect of all this was to make a delivery of the property to the Receiver, and to constitute Linville his agent for the custody and sale of the goods. Thompson, Garn *vs.* B. & O. R.R. Co., 28 Md., 396. The witness was then asked by the plaintiffs whether there was any written assignment, and replied he "thought there was a bill of sale, but whether on that day or prior thereto he was not sure, and he did not think that he had ever seen that bill of sale." The plaintiffs then further objected to so much of the testimony of the witness as purported to prove a transfer; on the ground the transfer was made by written instruments, respecting this, it is sufficient to say that it had not appeared the transfer had been effected by written instruments. Tbe witness only said "he thought" there was a bill of sale, but had never seen it. Such evidence is hearsay and not sufficient to support the objection made by the plaintiffs.

From what has been said it follows we find no error in the rulings of the Court set out in the first and second exceptions.

At the conclusion of the evidence the Court, at the instance of the garnishee, instructed the jury there was no evidence before them from which they could find that there was in the hands of the garnishee at the time of the laying of the attachment or since any of the goods, chattels or credits of the defendant. The propriety of this

ruling is the question presented by the third and only exception.

It must be borne in mind that the goods attached, it is conceded, were on the 25th of April, 1895, the property of the Silk Company; also the fact that up to and at the present time the writ was laid, that is, to the 27th December following, the garnishee still retained the possession of them. The only issue, therefore, between the parties seems to be, did the goods or the proceeds of the sale of them, for any reason, at any time between these dates, cease to be the property of the Silk Company? In presenting this question many points were raised and exhaustively and ably argued. In our view, however, it will not be necessary for us to consider more than a single phase of the case. At the outset, we may remark, there is no evidence in the record tending to prove the transfer to the bank or its receiver except that contained in the testimony of the garnishee. There is some evidence that some time in 1890 and 1894 certain papers, called by the witness "bills of sale," were made, but there is no proof whatever that the specific articles mentioned in them included any of the goods that were attached in this case. The first of these so-called bills of goods alleged therein to have been sold by the Silk Company to C. H. Risley, Cashier of the First National Bank, with the word "paid" at the end and signed "Barrows," a bookkeeper of the Silk Compar[illegible] the two others are like the first, except are append[illegible]e words: "The goods represented by this bill are pledg[illegible]) the National Bank of Willimantic as security for loans made by said bank to the Natchaug Silk Company." They are signed by J. D. Chaffee, President, and Charles Fenton, Treasurer. Of these instruments the treasurer, Fenton, testifies that no record was made in the books of the Silk Company, or any-

where else. They were never brought up at any meeting of the Company; none of the directors knew of them "as far as he knew," and none of the goods mentioned in them, or either of them, was ever delivered to the bank or set apart for it, but were sold from time to time and used in filling orders "the same as any other stock." Without pausing to inquire how far such instruments under all these circumstances could operate to transfer such a title to goods, either in Connecticut or Maryland, so as to defeat the claims of an attaching creditor in the latter State, it can be safely stated, there is nothing in them in the face of the papers themselves, or connected with them by proof, that in any manner affects the goods in the hands of the garnishee. It must be assumed, therefore, as we have already said, the whole case turns upon the effect of Linville's statements; and if upon the case made by his evidence, the transfer to the Bank, or its receiver, was not successfully effected, the title is still in the Silk Company, and the attachment of the plaintiffs must be maintained, although it may appear the Receiver of the Silk Company was appointed before the alleged transfer, it being conceded that the right of a creditor to attach goods in Maryland is not impaired by the previous appointment of a receiver in the State of Connecticut. Now Linville's testimony is, that on the 26th of April Chaffee came to his office in Baltimore; that he (Linville) had been the agent in that City of the Silk Company for five years, and that prior to that time had known Chaffee "only as having been President, Manager and everything else connected with the company." Chaffee told him "that to recompense or to make good a claim which the Bank had against the Company these goods had been transferred to Mr. Dooley, and then belonged to him, and he asked witness if he would continue to represent the Bank or Mr. Dooley

in the sale of the goods." Linville consented, received from Lucas, the attorney of Dooley, the authority to so act, and did so act up to the date of the attachment. This proceeding on the part of Chaffee was unknown to and without the authority of the directors of this Company, and was never ratified by them. Dooley subsequently, at a meeting of the directors in the Company's office in Willimantic, stated that " Mr. Chaffee had been to New York, Chicago, St. Louis and Baltimore, in an effort to secure the Bank of goods of the Natchaug Silk Company, that were held in these offices, and that it was very necessary that the board should ratify what had been done." It thus appearing that Chaffee's act in making the transfer was without the prior specific authority of his company, and was not subsequently ratified by the board of directors, it remains to inquire whether Chaffee as President or General Manager *virtute officio* or by usuage or otherwise, possessed the power and authority thus to bind the Company? To properly meet this question a brief statement of other facts in the case is required. The Natchaug Silk Company, organized originally as a joint stock company, was incorporated by the Legislature of Connecticut in 1889. Its business was the manufacturing and dealing in silk, leather, wool or other substances composed wholly or in part of these materials, and to do such other things as are incident to that business. Chaffee was its President and General Manager from the beginning. In the course of its business it became a borrower of the First National Bank of Willimantic. The record shows that its indebtedness on this account as far back as 1893 amounted to more than $285,000. It was enabled to secure this large credit with the Bank by reason of the fact that Silk Company's financial agent Risley was also the Cashier of the Bank. It was this credit only that for several years enabled

it to maintain itself as a going concern. In fact it had not been solvent since 1890. Risley died on the 12th of April, 1895, and on the 22d of the month the Bank went into the hands of the Receiver; and by reason of these facts the principal, if not the only source of credit of the Silk Company, was entirely cut off. To Chaffee, as well as to all who knew the situation, it became evident that the Silk Company's affairs must also pass, at no distant period, into the hands of a Receiver. Under these circumstances Chaffee determined to make an effort to secure the Bank by transferring to it the goods of his Company held in the office of its agents in New York, Chicago, St. Louis and Baltimore. Probably it was to make his action more effective, that shortly after Risley's death he forwarded goods of a large value to New York, assigning as a reason therefor that as he could get no more money from the bank he would make arrangements elsewhere. Almost all of the debts of the Silk Company were to become due on the 22d of April or within a few days thereafter. Chaffee seems to have kept his purpose strictly to himself. As he was about to start on his mission he told Barrows, the bookkeeper, "If he needed any counsel in the matter to consult Perkins." On 22d April he proceeded to New York and transferred all the company's goods, including those that he sent there a week before, to the Bank, on account of his company's indebtedness to the latter; thence he went to Chicago and Baltimore, and at each place made a transfer of all the goods held there, thus placing all the property of the Company outside of the State of Connecticut (so far as the record discloses) in the hands of the Bank. It is obvious such transfers were not made in the usual course of business, but solely for the purpose of devoting all the assets within his control (a receiver having been appointed for the Company in

Connecticut on the 25th of April) to the discharge of the antecedent claim of the Bank; thus constituting of his own will the Bank a preferred creditor of his insolvent Company. The 12th by-law of the Company provides for the election of a General Manager, "Who shall have entire charge of the business and affairs of said Company, subject to the order and approval of the board of directors." This by-law by reasonable construction confers full power to do all things and make all contracts that are needed in transacting the ordinary business of the corporation within the legitimate scope, objects and purposes of its organizations; but not such authority as that he may deal at his own pleasure with the assets, outside the regular course of business. Now, does it appear from anything contained in the record, that Chaffee had ever arrogated to himself much extensive authority. Prior to the transaction in question, he had never undertaken to dispose of the property of the Company, otherwise than in the regular course of business. This case is clearly distinguishable where one from the managing officer has disposed of the property for the purpose of procuring credit for his company. There are cases where that is held to have been a proper exercise of his authority. Fay *vs.* Noble, 12 Cush., 1; Lewis *vs.* Hartford Silk Company, 56 Conn., 36; but with that question we are not called upon to deal. In this case the transfer was for the purpose of securing or paying an antecedent debt. Chaffee's authority under the by-law and under that he was permitted to exercise in the management of the affairs of the company was conferred upon him for the purpose of enabling him to properly and successfully conduct the business, to keep the company a going concern with capacity to earn a profit for its stockholders; not that he might after the company became insolvent and was about to go

in the hands of a receiver, parcel out its assets or any portion of them among such of the crlditors as his caprice or interest might lead him to select. An authority like this has never been accorded, as far as we are informed, to any officer charged with the conduct of affairs of a corporation, whether he be called President, General Manager or by any other name, unless there had been conferred upon him a prior express authority by the directors or stockholders of the company. Ordinarily, it is true, an authority to do a particular act may be inferred by persons dealing with the corporation from the fact that the officer who is acting for it has habitually assumed and exercised the power in the face of the public. Olcott *vs.* Tiegra R.R. Co., 4 N. Y., 179; 4 Thompson on Corp., Sec. 4626; Cedar *vs.* Land and Son's Lumber Co., 85 Mich., 54.

But under no theory of implied power can either a President or General Manager transfer the assets of an insolvent corporation about to go into the hands of a receiver for an antecedent debt. The case of Hoyt *vs.* Thompson, 5 N. Y., 320, is instructive on this point. There the Morris Canal and Banking Company, an insolvent corporation of New Jersey, being indebted to the State of Michigan, its President and Cashier, without the authority of the directors to secure the payment of the Canal Company's debt, assigned to the State of Michigan a debt and mortgage due to the Canal Company by a railroad company. There was no proof that the State had any knowledge the assignments were made without the authority of the directors and such want of proof, if there were nothing else in the case, might probably authorize a presumption they were executed in pursuance of the authority of the directors, and that the President and Cashier of the Canal Company were acting within the

general scope of their powers; but that principle could not apply in that case, for, said Paige, *J.*, "If the assignments had been made to the State of Michigan for a new consideration paid at the time, or if the State had relinquished any security held by it, so as to entitle it to the character of a *bona fide* purchaser for a valuable consideration, and the agents * * * of the State * * * had no notice of the want of authority of the officers of the Canal Company making the assignment * * * the Company would be estopped from denying that the President and Cashier had competent authority to execute and deliver the assignments; but inasmuch as the State of Michigan received the assignments as collateral security, merely for an antecedent debt, the Morris Canal and Banking Company or its representatives are not estopped from denying the authority of its President and Cashier to execute and deliver the assignments."

It has always been held that unless there is prior express authority or subsequent ratification, or unless some principle of estoppel intervene, the President or Managing Agent has only the authority to bind the company while acting within the scope of his duties and in the ordinary routine of business, 4 Thomson on Corp., sec. 4849 *et seq.*, authority there cited. This is a general principle for which many cases could be cited. It has often been applied, as for instance, where managing officers have undertaken to consent to the appointment of a receiver (Waters *vs.* Angle Am. Mortgage Co., 50 Fed. Reporter, 316); or the release claims (Bank of U. S. *vs.* Dunn, 6 Peters (U. S.), 60); or alien property (Luse *vs.* Isthmus Transit R. Co., 6 Or., 125; Bliss *vs.* Kaweha Canal Co., 4 Pac. Rep., 507; Walworth County Bank *vs.* Farmers' L. & T. Co., 14 Wis., 325; Hyde *vs.* Larkin, 35 Mo. App.,

365; Bank *vs.* Lumber Co., 116 N. C., 828; England *vs.* Dearborn, 141 Mass., 590).

There is nothing in conflict with what we have said in Hadden *vs.* Natchaug Silk Company, 74 Feb. Reporter, 429. In that case Judge Shipman said, "The decisions of the State of Connecticut apparently recognize that a President, an unlimited General Manager of one of its Manufacturing Corporations, is vested with such power" (that is, to sell the property of a corporation in part payment of its debt), and that such transfer is valid; but adds that this being a question of law, "may be controlled by the facts which may subsequently appear as to any limitation of Chaffee's actual powers of which the bank had knowledge." The Court did not decide as to the power of Chaffee as to that the question was of a character which cannot be determined on affidavits nor does he decide what the powers of a general manager are in Connecticut, but only what it apparently is; and that it is subject to modification by other facts than these before him in that case.

We are of opinion, for these reasons, that Chaffee had no power under the circumstances contained in the record to make an effective transfer of the goods, and that the plaintiffs were entitled to maintain their attachment.

Finding error in the granting of the defendant's prayer, the judgment must be reversed.

Judgment reversed with costs, and cause remanded for new trial.

True copy:

Test: J. FRANK FORD,
Clerk, Court of Appeals of Maryland.

Judge Coxe's first opinion in this case—13th January, 1898—is printed, R., p. 682.

Judge Coxe's second opinion in this case—31st January, 1898—is printed, R., p. 690.

26th July, 1898—R. in number 97 (348 of October Term, 1899), p. 25.

88 Fed. Rep., 446.
60 U. S. App., 248.
31 C. C. A., 582.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT, MAY SESSION, A.D. 1898.

MICHAEL F. DOOLEY, as Receiver of the First National Bank of Willimantic, Connecticut,

vs.

JAMES PEASE.

No. 472. In Error to the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

Before WOODS and SHOWALTER, circuit judges, and BUNN, district judge.

WOODS, circuit judge, delivered the opinion of the court:

This was an action of trespass by the plaintiff in error, Michael F. Dooley, as receiver of the First National Bank of Willimantic, Connecticut, against the defendant in error, James Pease, charging him with having forcibly seized and carried away a stock of goods in store at numbers 213 and 215 Fifth avenue, in the city of Chicago. The defendant pleaded the general issue, under which it was agreed that all defenses of whatever nature might be proved as if specially pleaded, and by stipulation in writing a jury was waived and the court made a special finding of facts upon which it pronounced the defendant not guilty, and gave judgment accordingly. Error is assigned to the effect that the judgment is not supported by the facts found.

The special finding is made of great length by the statement of many facts which, though relevant and important, are evidentiary only of the ultimate facts found. For the

present purpose a short statement will be sufficient. At the time of the alleged trespass, May 20, 1895, the defendant, Pease, was the sheriff of Cook county, Illinois. He seized the goods by virtue of a writ of attachment, for the sum of $14,786.53, issued out of the circuit court of Cook county, against the Natchaug Silk Company, a corporation of Connecticut, and four days later he levied on the goods another attachment out of the same court against the same company for a sum exceeding $8,000.00. The validity of the writs under which the seizure was made is not questioned. The dispute is over the ownership of the goods at the time of the seizure. They had belonged to the attachment defendant, The Natchaug Silk Company, prior to and on April 25, 1895, and the point of dispute is whether the instrument of sale that day executed in the name of the company by its president was valid and effective to transfer title to the plaintiff in error as receiver of the First National Bank of Willimantic, Connecticut. The validity of that instrument is denied on several grounds. The first is that the president of the company was without authority to make the sale. Upon this point the court found, as a fact, and also as a matter of legal conclusion, that the president of the company had no authority to make the sale, and seems to have placed its decision of the case mainly upon that ground. It is insisted that certain facts specifically stated in the finding require the contrary conclusion. The facts chiefly relied on are, that the president of the company had also been made its general manager; that as president he was empowered by a by-law of the corporation to "perform all duties especially required of him by the statute laws of this State (Connecticut), but his charge of the executive business of the company shall be subject to the control of the directors;" and that by an amendment of the by-laws a general manager was to be chosen annually who should "have entire charge of the

business and affairs of the said company, subject to the order and approval of the board of directors." On the authority of Hadden *v.* Dooley, 38 U. S. App., 651; 20 C. C. A., 494; Scudder *v.* Anderson, 54 Mich., 122, and especially of Lewis *v.* Hartford Silk Mfg. Co., 56 Conn., 25, it is insisted that the power of general management so given to the president of the company, included the power to pay the debts of the company by the application of any portion or all of its personal property. Manifestly, however, such a question is not one of law purely, but also of fact, dependent upon the circumstances of each case. The cases mentioned, it is to be assumed, were decided correctly upon the proofs adduced. In this case the court found the fact to be that the sale was unauthorized and had never been ratified by the company; and there are many circumstances and evidentiary facts set forth in the special finding which tend to support the conclusion, the chief being that the debtor company was at the time absolutely insolvent and on the verge of suspending business, and that, without the sanction of any other officer or member of the company, the president, knowing the situation, made this sale and others, covering the entire property of the company, to particular creditors for the purpose of preferring them over other creditors. Whether the finding of the court upon this question was according to the preponderance of the evidence is a question which this court cannot consider. Besides the provision in section 1011 of the Revised Statutes that "there shall be no reversal * * * upon a writ of error * * * for any error of fact," it is well settled that under sections 649 and 700 the right of review, when judgment has been rendered upon a special finding, extends only to "the rulings of the court in the progress of the trial," and to "the determination of the sufficiency of the facts proved to support the judgment." The cases on the subject in

the Supreme Court and in the circuit courts of appeals are numerous. See Fourth National Bank *v.* City of Belleville, 53 U. S. App., 28; 27 C. C. A., 674; Sunley *v.* Barker, 55 U. S. App., 125; Stanley *v.* Supervisors, 121 U. S., 535; Hathaway *v.* Cambridge Nat. Bank, 134 U. S., 494; St. Louis *v.* Rutz, 138 U. S., 226. In Runkle *v.* Burnham, 153 U. S., 216, it is said that "findings of fact made by the court below are binding here if there be any evidence to support them."

It necessarily follows, and has often been decided, that a mixed question of law and fact cannot be reviewed on a writ of error. Dennistown *v.* Stewart, 18 How., 565; Jewell *v.* Knight, 123 U. S., 426; Smith *v.* Craft, 153 U. S., 436; Burnham *v.* North Chicago Street R'y Co., 46 U. S. App., 670; 23 C. C. A., 677. When the trial is by jury the law part of such mixed questions may be saved for review on exceptions to the rulings of the court (Norris *v.* Jackson, 9 Wall., 125), but if a party sees fit to waive a jury in a case involving a question of that kind, he puts it beyond his power to challenge the court's finding, unless he may chance to be able to do so upon an exception to a ruling during the progress of the trial. For instance, if the issue be negligence, which rarely is resolved into a pure question of law, a special finding of the ultimate fact either way cannot be overthrown by force of merely evidentiary facts stated in the finding, however strong; and so, here, the finding that the sale was unauthorized and was not ratified cannot be impeached on the strength of the circumstances stated tending to show the contrary.

The sale, made as it was without authority, did not pass title, and the goods were therefore subject to seizure by virtue of the writs of attachment.

Another ground on which the sale was clearly invalid is the finding of the court that the sale was not followed by an open or visible or notorious change of possession or

ownership, unless, as matter of law, the facts stated in the finding constituted sufficient information to the public of the change. The facts so stated were evidentiary only, and, instead of being conclusive of publicity, tended rather to show intentional concealment. They were certainly sufficient, even if we were required to look into the evidence, to support the finding of the ultimate fact. The sale was therefore void under the law of Illinois, which "will not permit the owner of personal property to sell it and still continue in the possession of it." Green *v.* Van Buskirk, 7 Wall., 139; Henry *v.* Locomotive Works, 93 U. S., 664; Martin *v.* Duncan, 156 Ill., 274; Harkness *v.* Russell, 118 U. S., 663; Pullman Car Co. *v.* Pennsylvania, 141 U. S., 18.

It is urged that while the Federal courts follow the rule of the State that a transfer of personal property, where the vender is permitted to remain in possession, is fraudulent and void as to creditors, the Federal courts are not bound to give heed to the opinions of the supreme court of Illinois upon matters of fact, and that what will constitute a sufficient change of possession must necessarily be determined upon the facts of each case. That may be conceded; but the court here having determined the fact against the appellant, whether according to the weight of the evidence or not, the finding, by the authorities already cited, cannot be reviewed.

There are other propositions embraced in the finding which, it is urged, are sufficient to support the judgment rendered, but they need not be considered.

The judgment is affirmed.

The opinions of the Circuit Court of Appeals in this case —25th January, 1899—are printed, R., p. 708.

And its opinion on rehearing—4th April, 1899—is printed, R., p. 720.

At a Term of the Circuit Court of the United States for the Southern District of New York, held at the Federal Building, in the City of New York, on the 26th day of January, 1897.

Present—Hon. E. HENRY LACOMBE,
Circuit Judge.

HAROLD F. HADDEN and JAMES E. S. HADDEN,
Complainants,

against

THE NATCHAUG SILK COMPANY; MICHAEL F. DOOLEY, personally and as Receiver of the First National Bank of Willimantic; JOHN A. PANGBURN and others,
Respondents.

A motion having been made herein by the respondent Michael F. Dooley, personally and as Receiver of the First National Bank of Willimantic, and by the respondent John A. Pangburn, upon the pleadings and proofs in the action to dissolve the injunction originally granted in July, 1895, by Mr. Justice Stover, of the Supreme Court of New York, and afterwards continued by this Court until the further order of this Court by an order of the 21st of August, 1895, and by an order of 12th December, 1895; and after hearing Mr. Paige for the motion, and Mr. Putney and Mr. Twombly, opposed, and there having

been deposited with this Court, to be held subject to the final decree in this action, the following notes of the Natchaug silk Company, to wit:

One dated June 1, 1894, for $5,922.63 at four months.
One dated Oct. 4, 1894, for $5,922.63 at four months.
One dated Feby. 7, 1895, for $5,922.63 at four months.
One dated June 1, 1894, for $5,000 at four months.
One dated Oct. 4, 1894, for $5,000 at four months.
One dated Feb. 7, 1895, for $5,000 at four months.
One dated May 29, 1894, for $5,000 at four months.
One dated Oct. 2, 1894, for $5,000 at four months.
One dated Feb. 5, 1895, for $5,000 at four months.
One dated May 29, 1894, for $5,000 at four months.
One dated Oct. 2, 1894, for $5,000 at four months.
One dated Feb. 5, 1895, for $5,000 at four months.
One dated May 22, 1894, for $5,000 at four months.
One dated Sept. 25, 1894, for $5,000 at four months.
One dated Jan. 28, 1895, for $5,000 at four months.
One dated May 21, 1894, for $2,500 at four months.
One dated Sept. 24, 1894, for $2,500 at four months.
One dated Jan. 26, 1895, for $2,500 at four months.
One dated May 19, 1894, for $5,000 at four months.
One dated Sept. 22, 1894, for $5,000 at four months.
One dated Jan. 25, 1895, for $5,000 at four months.
One dated May 19, 1894, for $5,000 at four months.
One dated Sept. 22, 1894, for $5,000 at four months.
One dated Jany. 25, 1895, for $5,000 at four months.
One dated May 12, 1894, for $5,000 at four months.
One dated Aug. 11, 1894, for $5,000 at four months.
One dated Jany. 10, 1895, for $5,000 at four months.
One dated May 12, 1894, for $5,000 at four months.
One dated Aug. 11, 1894, for $5,000 at four months, and one dated Jany. 10th, 1895, for $5,000 at four months.

And also the following notes of the Natchaug Silk Com-

pany, all at four months and of the following dates and amounts; to wit:

September 26, 1893.....	$5,922 63
May 23, 1893.....	5,922 63
January 20, 1893.....	5,922 63
September 17, 1892.....	5,922 63
May 14, 1892.....	5,922 63
January 12, 1892.....	5,922 63
September 9, 1891.....	5,922 63
September 26, 1893.....	5,000 00
May 23, 1893.....	5,000 00
January 20, 1893.....	5,000 00
September 17, 1892.....	5,000 00
May 14, 1892.....	5,000 00
January 12, 1892.....	5,000 00
September 9, 1891.....	5,000 00
May 6, 1891.....	5,000 00
January 3, 1891.....	5,000 00
September 23, 1893.....	5,000 00
September 23, 1893.....	5,000 00
May 20, 1893.....	5,000 00
January 17, 1893.....	5,000 00
September 16, 1893.....	5,000 00
May 13, 1893.....	5,000 00
September 15, 1893.....	2,500 00
May 12, 1893.....	2,500 00
January 9, 1893.....	2,500 00
September 6, 1892.....	2,500 00
May 3d, 1892.....	2,500 00
December 31, 1891.....	2,500 00
August 28, 1891.....	2,500 00
April 25, 1891.....	2,500 00
September 13, 1893.....	5,000 00
May 10, 1893.....	5,000 00
September 13, 1893.....	5,000 00

May 10, 1893.....	5,000 00
September 9, 1893.....	5,000 00
May 6, 1893.....	5,000 00
Jany. 3, 1893.....	5,000 00
September 6, 1893.....	5,000 00
May 3, 1893.....	5,000 00
December 30, 1892.....	5,000 00
August 27, 1892.....	5,000 00
September 9, 1893.....	5,000 00
May 6, 1893.....	5,000 00
Jany. 3, 1893.....	5,000 00
September 6, 1893.....	5,000 00
May 3, 1893.....	5,000 00
December 30, 1892.....	5,000 00
and August 27, 1892.....	5,000 00

It is now ordered that the said injunction be and the same is hereby dissolved.

Jan. 26, 1897.

E. HENRY LACOMBE,
U. S. Circuit Judge.